Supreme Court, U.S.
FILED
JUL 1 1996
CLERK

(1) 96-23

No. _____

In The
Supreme Court Of The United States

OCTOBER TERM 1996

ANTHONY M. AMATO
and
A. MICHAEL SCOTT, SR.,

Petitioners, pro se,

V.

CITY OF RICHMOND, W.R. SHUMAN, ROBERT HOSICK, TERESA P. GOOCH, LAUREL MILLER, PHILIP MANGANO, MARTY M. TAPSCOTT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Anthony M. Amato, *pro se*
A. Michael Scott, Sr., *pro se*
7400 Beaufont Springs Drive #500
Richmond, Virginia 23225-5519
(804) 330-0006

July 1, 1996

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

190 P12

QUESTIONS PRESENTED FOR REVIEW

I. Does the burden of proof on consensual searches vary according to the civil or criminal nature of the proceeding, or does the constitution mandate a consistent approach to proving consent to all Fourth Amendment searches?

II. Does the Supreme Court's recognition that "whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities," Skinner v. Railway Labor Executives' Assoc., 489 U.S. 602, 614 (1989), present a factual question inappropriate for resolution on motion for summary judgment?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES . . . . . iii, iv, v

OPINION BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

ARGUMENT 16

CONCLUSION 30

TABLE OF AUTHORITIES

CASES:

Allen v. City of Portland, 1995 WL 747768 (9th Cir. 1995) 19, 26

Amato v. City of Richmond, 875 F.Supp. 1124, 1134 (E.D. Va. 1994) 17, 30

Amato v. City of Richmond, No. 95-1114 (4th Cir. March 5, 1996) 16, 30

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986) 18, 25

Boyd v. United States, 116 U.S. 616, 635 (1886) 22

Crowder v. Sinyard, 884 F.2d 804, 824-26 (5th Cir. 1989) 17

DeLoach v. Bevers, 922 F.2d 618, 621 (10th Cir. 1990) 18, 24, 26

DePugh v. Smith, 880 F.Supp. 651 (ND Iowa 1995) 17, 22

Goodwin v. Metts, 885 F.2d 157, 164 (1989) 24, 27

Huotari v. Vanderport, 380 F. Supp. 645, 648 (D. Minn. 1974) 17, 19, 20, 22

Jones v. United States, 357 U.S. 493, 499 (1958) 19

Karnes v. Skrutski, 62 F.3d 485, 495 (3rd Cir 1995) 17, 22

Katz v. United States, 389 U.S. 347, 357 (1967) 19

Larez v. Holcomb, 16 F.3d 1513, 1517 (9th Cir. 1994) 17

Malley v. Briggs, 475 U.S. 335, 344 (1986) . . 18, 20, 21

McGann v. Northeast Illinois Regional Commuter Railroad, 8 F.3d 1174 (7th Cir. 1992) 17, 22

Moore v. Marketplace Restaurant Inc., 754 F.2d 1336, 1345 (7th Cir. 1985) 26, 27

Peterson v. City of Plymouth, 60 F3d 469, 476 (8th Cir. 1995) 27

Reed v. Commonwealth, 6 Va. App. 65, 71, 366 S.E.2d 274 (1988) 25

Ruggiero v. Krzeminski, 928 F.2d 558, 563 (2nd Cir. 1991) 17

Schneckloth v. Bustamonte, 412 U.S. 218, 223 (1973)

. . . . . 18, 19, 20, 21, 22, 23

Skinner v. Railway Labor Executives' Assoc., 489 U.S. 602, 614 (1989) . . . . . i, 24, 26

Tarter v. Raybuck, 742 F.2d 977, 980-01 (6th Cir. 1984) 17, 20, 22

U.S. v. Leon, 468 U.S. 897 (1984) 18

United States v. Morrow, 731 F.2d 233, 236 (4th Cir.

1984) 20

UNITED STATES STATUTES:

28 U.S.C. 1331 2

28 U.S.C. 1343 2

28 U.S.C. 1367 2

42 U.S.C. 1983 . . . . . 17, 18, 21, 22, 23

VIRGINIA STATUTES:

Virginia Code §18.2-119 25

Virginia Code §19.2-20 9

OTHER AUTHORITIES:

CCH Reports; ¶36,589.01 21

Internal Revenue Code of the United States, § 761 . . . 21

I.R.S. Temporary Reg. § 1.6031(b)-1T(a)(3) 21

In The
Supreme Court of the United States

October Term, 1996

ANTHONY M. AMATO,
A. MICHAEL SCOTT, SR.,
Petitioners, pro se

V.

CITY OF RICHMOND, W. R. SHUMAN,
ROBERT HOSICK, TERESA P. GOOCH,
LAUREL MILLER, PHILIP MANGANO,
MARTY M. TAPSCOTT,
Respondents.

Petition for Writ of Certiorari to the
Supreme Court of the United States
Fourth Circuit Court of Appeals

Anthony M. Amato and A. Michael Scott, Sr., respectfully petition for a Writ of Certiorari to review the judgment of the U.S. District Court for the Eastern District of Virginia, at Richmond, and the Fourth Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals is in Appendix, infra, A1-A3. That unpublished opinion, *per curiam*, decided a question of first impression in

that Circuit which conflicts with decisions of other Circuit Courts of Appeal. Furthermore, the Panel exceeded its review powers by resolving factual issues against petitioners even though petitioners were opposing a motion for summary judgment and were entitled to have all disputed facts resolved in their favor.

JURISDICTION

Petitioners (plaintiffs) filed this case in the U. S. District Court for the Eastern District of Virginia, Richmond Division, based upon the existence of a federal question over which Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. Included in those actions were state law claims over which that Court had pendant jurisdiction pursuant to 28 U.S.C. § 1367.

STATEMENT OF THE CASE

Throughout the events giving rise to this lawsuit, the defendants engaged in a course of activity designed to exert emotional pressure Amato and Scott to discover if they were involved with federal authorities in an investigation of police and public corruption in the City of Richmond. This activity included, among other things, an attempt to implicate Scott in criminal activity, fabricated charges against Amato for trespass and extortion, an illegal search of Scott's home and Amato's place of residence, a transfer of Scott based upon his refusal to cooperate in the Respondents' (defendants') improper activities, and harassment of both Scott and Amato. That harassment continues to the date of this petition.

A. SCOTT Prior to 1991, Scott was a detective with the Richmond Police Department assigned to its Criminal Intelligence Unit. As part of that assignment, Scott was on

loan to the Federal Bureau of Investigation for a number of years. Scott's work with the FBI and with the Criminal Intelligence Unit was exemplary. Scott received the highest ranking, reserved for unusual excellence, in 1989 and 1990.

Scott's work with the FBI included investigations into police corruption within the Richmond Police Department. One such investigation involved a Richmond Detective assigned to the Homicide Unit under the command of Captain Teresa P. Gooch ("Gooch"). Scott's involvement in the investigation was widely known within the Richmond Police Department. Chief Marty M. Tapscott ("Tapscott") went to the federal authorities to complain and asked that in the future he be made aware of investigations involving his officers.

Scott also was involved in a internal police corruption investigation along with Det. Sgt. Thomas Clarke ("Clarke") of other Richmond police officers. Scott was specially assigned to work with Clarke on one investigation by Major Laurel N. Miller ("Miller"), a Deputy Chief of Police. When Clarke and Scott requested that the FBI be brought into the case, Miller refused, and terminated the investigation.

In June 1991, Scott was reassigned from the Criminal Intelligence Unit and his work with the FBI, to the Detective Division. Tapscott claims that Scott was transferred after his immediate superior, Det. Sgt. Everett Mozingo, had come to him saying that Scott could not be controlled and that he (Mozingo) wanted Scott out of the Unit. Tapscott denied seeking input on the decision to transfer Scott or even discussing that decision with Miller. Miller claims that he knew nothing about Scott's reassignment, and, in fact knew nothing about Scott's work in Criminal Intelligence or with federal authorities. Mozingo, however, claims that Tapscott appointed Miller to look into the types of investigations Scott was doing with federal authorities, and decide whether that work should continue. Scott's transfer to the Detective Division placed him under the control of Miller and Gooch.

B. AMATO Amato, who, until the time of incidents argued herein, had no criminal record, had never had to make arrangements to avoid any prosecution anywhere, and had worked as an undercover operative in the past with various federal law enforcement agencies, including the FBI, the Internal Revenue Service, and others. In 1987 and 1988, Amato was working with the FBI in the City of Richmond on gambling, public corruption and narcotics investigations. It was during this time that he met Scott, who was part of the federal task force.

That investigation, which included an operation on gambling commonly referred to as the Rosenbaum matter, resulted in multiple arrests and criminal convictions. Amato performed valuable services to the federal authorities during that investigation. Amato left Richmond in 1988 after Rosenbaum and worked on other matters for various federal agencies. In December 1991, he was between assignments and returned to the Richmond area. Prior to his arrival, Amato contacted Scott and asked if he could stay at Scott's house in Chesterfield County. Scott, living elsewhere agreed, and they entered into a lease providing Amato a private bedroom and common access to other parts of the house.

C. ACOLA'S Scott had an interest in a partnership that owned a building at 200 E. Main Street in the City of Richmond. In late 1991, the building was being leased to Kenneth Acola ("Acola"), who operated Acola's Restaurant. At that time, Acola was many months behind in his rent. Acola was also being sued by Scott and his aunt for rents, as well as many other creditors for business debts. Scott, who was out of work injured, requested Amato to help the partnership's attorney, W. Todd Benson, Esq. ("Benson"). Amato was not compensated for his assistance.

(1) January 21, 1992 Incident (the Alleged "Extortion") On January 21, 1992, upon the legal advice of Benson, Amato and Fred Bilter ("Bilter"), a retired City of Richmond

fire-fighter, went to Acola's at the close of business to serve Acola with a letter terminating Acola's lease from the Benson and to change the locks (exercising the right of "self help"). Acola called the police. Officer Gordon Overstreet ("Overstreet") responded along with three other Richmond police officers. Before Amato, Bilter, and the police left the premises as Overstreet directed, Overstreet specifically asked Acola if he had been threatened and whether everything was satisfactory. Acola said that he had not been threatened and that everything was alright.

(2) March 22, 1992 Incident (the Alleged "Trespass")

On March 22, 1992, Scott, riding by the restaurant, became suspicious that Acola was carrying out earlier threats to damage the leased premises. The restaurant had been posted with "closed" signs stating it would re-open soon. Scott contacted Amato, who in turn contacted Benson. Amato and Benson went to the restaurant, but not before requesting the Richmond Police to have an officer meet them.

Officer Timothy Arthur ("Arthur") met them at 200 E. Main Street. Discovering that the building's locks had been changed (in violation of the lease provisions), Amato forced open a door to the upstairs, and then he, Benson and Arthur entered the premises. The lease expressly gave the landlord (and its agents) a right of access. In addition, Acola had previously abandoned in court proceedings any possessory interest to that portion of the premises. Also, some five days prior, Acola had sold all of his interest in the restaurant property (including furniture/fixtures) and the leased premises to another entity (also in violation of his terminated lease). Amato and Benson discovered that the premises had been savagely damaged, per Acola's previous threats. Upon leaving, they advised Arthur that they were going to use some wood on the property (belonging to Scott) to secure the door.

Acola, who was not present, filed a complaint against Benson and Amato for burglary and breaking and entering.

He also filed an internal affairs complaint against Scott alleging improper use of police powers.

D. THE CITY'S INVESTIGATION Acola's breaking and entering complaint was first routinely assigned to two burglary squad detectives. After those detectives concluded the matter was civil in nature and no offense had been committed, Miller and Gooch assigned the case Detective Sgt. Robert Hosick ("Hosick"), an Arson & Auto Theft detail supervisor, who followed the orders of Miller and Gooch.

Hosick's investigation focused on efforts to link Scott to illegal activity. According to Detective Buddy Sipple ("Sipple"), who handled the Internal Affairs complaint by Acola, Miller and Gooch were behind Hosick's investigation and they were "after" Scott.

Miller also kept his hands on the pulse of the Internal Affairs investigation of Scott. Sipple felt pressured by Miller to find that Scott had violated department rules and regulations, although Sipple's investigation was revealing that no such violations had occurred.

E. THE FEARED "FEDERAL INVESTIGATION"

During the City's investigation, the defendants began to believe that Scott and Amato were setting up an undercover operation with federal authorities on Richmond police and city personnel. Acola told both Hosick and Detective William R. Shuman ("Shuman") that Scott, Amato and an FBI Special Agent attempted to set Acola up on an investigation of corrupt city officials. However, unknown to respondents, Acola was secretly working with the FBI on a supposedly corrupt City building inspector, who subsequently committed suicide. Amato had no part of that investigation as he was far removed from the area during its progress. Scott, however, had received the information from Acola, put him in touch with the FBI, and then stepped aside.

Then Assistant Commonwealth's Attorney William H. Parcell, III, ("Parcell"), also had conversations with Hosick,

Gooch and Miller at this time indicating that Amato was an informant set up by the FBI to investigate the police department and official corruption. Parcell mentioned that Amato had worked on at least four police officers (one a former roommate of Parcell's) of whom he was aware. Similarly, Shuman developed a theory that Scott and Amato were attempting to kick Acola out of his restaurant to set up a federal sting investigation into public corruption, he has admitted discussing this theory with both Gooch and Hosick.

Other defendants considered as well that a federal investigation involving Amato or Scott was a distinct possibility. Miller admitted that he had concerns. Also, Gooch stated that she felt Scott was acting as if he "was on some secret federal investigation."

To discover what such federal investigation entailed, Hosick confronted Scott at the direction of Gooch and demanded to know what Amato was working on and whether he was investigating any police officers in the City. When Scott insisted that he did not know what Amato was working on, Hosick stated: "Listen Mike, if he's working on any Richmond [police department] people, and we think he is, you gotta' tell me."

Hosick, on Amato's surrender admitted to Amato that "they" knew he had done nothing wrong; however, "they" were out to get Scott. Hosick also told Amato that if he would just tell them who he was working on, then "the matter would be over in a couple of days."

F. THE TRESPASS CHARGE Shortly after Acola was charged with felony tax evasion[1] by state authorities (to

---

[1]Respondents have never divulged, to any Court, that; Acola's real name was Bacola, that Bacola had a long criminal record and history of being mentally disturbed, that Bacola used multiple names and social security numbers. This information was withheld from all criminal proceedings and proceedings below, even though this question was

which he subsequently pleaded guilty), Acola went first before Magistrate John Thomas, who interviewed Arthur, and refused to give Acola a warrant for either Amato or Benson. During his investigation, Hosick personally went to yet another magistrate, A. Christine Browning, to secure a warrant against Amato. She also refused to issue a warrant. Hosick's notes indicate that at the conclusion of his investigation, no probable cause existed to charge Amato with any crime, and he marked his report as "unfounded". Such a finding, customarily concludes an investigation.

Hosick, however, after advising Scott, Benson and Acola that no charges would be brought, after concluding his investigation, and after having The Commonwealth Attorney review and concur in his finding, took it upon himself to call upon yet a third magistrate - Chief Magistrate William R. Shannon ("Shannon"). Hosick ***knowingly*** withheld from Shannon, that Acola had no possessory interest in the property at the time of the alleged trespass as he [Acola] had conveyed all his rights away some five days before the alleged trespass; that Amato was acting as agent for the landlord at the time of the entry; that the lease clearly gave the landlord the right of entry; that two other magistrates had denied a warrant based upon the same information; and that Acola had given false information to Hosick in at least two previous instances.

Hosick's own notes reflect that Acola would have trouble obtaining any charge against Amato based upon the lease provision giving the landlord (Scott & Scott Investments) and its agent (Amato) access to the premises.

Hosick, upon pressing Shannon (a retired City of Richmond police officer) indicated that <u>he would give Hosick a warrant</u> if there was a previous occasion where Acola had

---

a part of petitioners' discovery.

told Amato not to come back upon the premises. Hosick then telephoned Acola at home and told him what Shannon had said. Hosick immediately went to Acola's residence in his police car and chauffeured Acola to Shannon's office, introduced him. There Acola regurgitated Hosick's information *ver batim*, Hosick stepping aside only to return to pick up the warrant.[2] For the very first time in three months, after countless Internal Affairs interviews with police, Acola suddenly remembered what Hosick had induced him to state. Thereafter, Hosick called Scott and informed him that a warrant had been obtained. Scott advised that Amato was out of town, but said that when he heard from Amato, he would have Amato contact Hosick to discuss the matter.

G. THE SEARCH Six days later, on the morning of Thursday, April 16, 1992, Parcell met with Miller, Gooch and Hosick. Parcell said that Scott and Benson had gone to speak with an Assistant United States Attorney in an effort to have Amato's trespass warrant quashed (which in fact, never occurred). They discussed that this was unusual. They also expressed concerns that Amato was living in Scott's home. They felt that Scott might be committing a crime by harboring a fugitive. As they further discussed what to do, Miller told Parcell that he would call Scott into his office and question him about Amato.

Miller, Gooch and Hosick then discussed the situation among themselves. Miller decided to have Scott accompany Hosick to Scott's home to arrest Amato because Scott could provide access to the home if necessary. Miller stated if Amato had been found at home but refused to answer the door, Scott would have had a duty produce his key to arrest

---

[2]However, the Complaint for the Warrant was not notarized nor otherwise subscribed before a competent officer as required under Virginia Code §19.2-20. Further the address on the arrest warrant for Amato was so incorrect as to render it worthless.

Amato. Miller then called Internal Affairs to inquire if they would participate in questioning Scott and go to Scott's home. Captain William Robertson ("Robertson") and Sipple of Internal Affairs (who were still investigating Acola'a complaint against Scott) went to Miller's office.

Sipple, apprehensive about the matter, asked his supervisor, Robertson, to get him out of any trip to Scott's home. He had been pressured for weeks by Miller to find that Scott had committed some wrongdoing. He also was well aware that Miller and Gooch were "after" Scott. He did not want to participate in the trip because he felt that Scott might be ordered to open up his home, which, from his previous narcotics detail experience, "would amount to an illegal search."

Miller was asked if he intended to handle the matter "administratively" or "criminally". If the matter was to have been handled "administratively", Scott would have been read his "Patrolman's Bill of Rights" and would have been required to sign the "Bill of Rights" form. When Miller announced that the matter would be handled "criminally" and that Scott would not be read his Patrolman's Bill of Rights, Robertson and Sipple refused to participate and left.

Gooch then called the First Precinct and spoke with Scott's supervisor, Clarke. She said that Scott was to report to Miller's office. Clarke indicated that Scott was busy preparing a search warrant and asked for some additional time. Initially, he was allowed twenty minutes. Approximately five minutes later, however, Gooch called again and said that Scott was to report immediately to Miller's office.

Scott met Gooch and was taken to Hosick's office and left there with Hosick. Both were called to Miller's office.

Miller asked if Scott knew that there existed an arrest warrant for his roommate. Scott responded that Hosick had made him aware of that fact. Scott told Miller that Amato was out of town, just as he had advised Hosick six days

earlier.

Miller ordered Scott to go with Hosick to his home and arrest Amato. Scott again reminded Miller that Amato was not at home (in fact, Amato was being prepared by the Government for trial in a federal case against narcotics dealers and money launderers in another state). Scott also reminded the Major that he did not have arrest powers in Chesterfield County (Scott's home, more than 20 miles from the City limits). Miller responded "in a loud and menacing manner" that he was ordering Scott to go to his home to arrest Amato. Miller expected his order to be followed and Scott would have been subjected to disciplinary (insubordination) charges had he failed to follow such an order. As Scott and Hosick prepared to leave, Miller told Hosick, "don't let him [Scott] out of your sight until you search." He also instructed Hosick to obtain the assistance of another sergeant.

Hosick enlisted the assistance of Det. Sgt. Philip Mangano ("Mangano"). Scott bitterly complained to Mangano that he had been ordered by Miller to go to his house. During the trip to Chesterfield County, Scott again complained about being ordered by Miller to go to his home. He advised once again that Amato was not at the house, but out of town.

A Chesterfield County police officer was met at a nearby rescue squad. They all then travelled to Scott's house. Upon arrival, and in the presence of Mangano, but not the Chesterfield police officer, Hosick directed Scott: "Mike, we've got to look in the house".

Hosick, the Chesterfield police officer and Scott proceeded to the front door while Mangano went to the rear of the house. Scott mentioned to the Chesterfield officer that he was "embarrassed" by the situation however, he had been ordered to go along. He also told the Chesterfield officer that no one was at home.

The Chesterfield officer was handed the warrant by

Hosick and knocked on the door. When no one answered, as expected, Scott opened the front door as he had been so ordered to do. The Chesterfield Officer states he stopped at the threshold of the door. Scott went into his home as he was so ordered to do by his superior, Hosick. Hosick entered and searched the premises, including Amato's bedroom. When Hosick searched Amato's bedroom, Scott was not present. However, Scott heard a closet door being opened and papers being rifled. Hosick seized several items from Amato's bedroom, including a subpoena which bore Amato's federal code name "Mattie". Mangano subsequently entered the home and participated in the search. When Scott returned to the First Precinct, he complained about the illegal search. He subsequently talked with Captain A. Christine Bailor ("Bailor"), the Officer in Charge of the First Precinct, who advised Scott to secure legal assistance, as his constitutional rights might have been violated.

Bailor complained on behalf of Scott to Robertson, the Officer in Charge of Internal Affairs, who indicated that he was already aware of the matter. Bailor then protested to Tapscott, who advised that he also was aware of the matter and that there were things about which Bailor was unaware and did not need to know.

Miller, Gooch and Tapscott all deny knowing that after the April 16 incident, Scott was claiming his home had been illegally searched.

Scott's complaint, however, was well known throughout the department. Moreover, the day following the search, Gooch, Hosick and Parcell met and discussed Scott's claim that Scott's home had been illegally searched and that papers had been taken. In addition, Scott's claim of an illegal search was included in papers later reviewed by both Tapscott and Miller pursuant to a grievance Scott filed over his subsequent transfer from the Detective Division to Patrol Operations. Tapscott does not recall whether Bailor talked to him about

an illegal search, but said that if such an allegation had been brought to his attention, he would have initiated an investigation by the Internal Affairs Unit. Bailor clearly advised the Chief about the claim, yet there was no investigation.

Tapscott was similarly advised by yet another Richmond Detective, John Harris, that he should look into the harassment of Scott at the hands of his supervisors, Gooch and Miller. Once again this prompted no action by the Chief.

H. OFFICER SCOTT'S TRANSFER The day after the illegal search, Gooch prepared a memorandum to Miller recommending that Officer Scott be transferred. Curiously, Gooch can not recall[3] what "prompted" her to write this memorandum. In that memorandum, however, she cites three incidents *about which Miller was already aware.*

During her tenure as Captain of the Detective Division, Gooch has recommended but only two involuntary transfers. One was Scott. The other was Detective Douglas Moore ("Moore"), who, like Scott, had previously worked with federal agencies and was also involved in the Rosenbaum investigation.

Subsequently, Miller prepared a short memorandum to Tapscott recommending that Scott and others be transferred. No explanation was given at that time by Miller to Tapscott. The procedure followed by Miller and Gooch was not in keeping with the Department's policies relating to involuntary transfers.

I. THE EXTORTION CHARGE Acola's restaurant was burned by an arsonist on or about April 22, 1992. Det. W. R. Shuman ("Shuman") was assigned to investigate the arson, and periodically updated Gooch on his progress.

At this same time, Acola was now a fugitive from

---

[3]Curiously, in her depositions, Gooch could not remember or recall key facts over 260 times.

justice on multiple felony tax charges placed against him by the State of Virginia.

During his investigation, Shuman developed information which he believed confirmed the validity of his theory about Amato, Scott and a federal investigation. For example, he spoke with Robert Williamson, a person that Amato had been instrumental in convicting during the Rosenbaum investigation. Williamson told Shuman that Amato worked with an IRS agent and an FBI agent, and that the "overall plan of the investigation was to see what police/judge/or other city official he [Williamson] would go to if he was arrested."

Shuman also interviewed an inmate of the Petersburg Federal Correctional Facility whom Amato was instrumental in convicting for narcotics violations.

Shuman attempted to find out from several federal officials whether Amato was, in fact, still working for them. He spoke with an Assistant United States Attorney and asked whether Amato was currently working with the Drug Enforcement Agency, all refusing to discuss Amato with him.

Shuman attempted to find out if Scott was passing information to the FBI and the IRS about Richmond police officers. Shuman's notes include the following: "FBI How about Mike Scott. Did he give names of policeman [sic]- who were they." Immediately next to this note Shuman wrote: "Same? IRS". Shuman also attempted to discover what he could about Amato's secret federal code name "Mattie" which he gave to a Richmond Police Lieutenant to check with federal sources. The officer remembers that the name was a "very unusual", "one-word" name. The code name "Mattie" appeared on a U.S. Marshall's Service facsimile cover sheet attached to a witness subpoena for Amato, which coincidentally, disappeared at the time of the search of Scott's home.

Shuman became fearful that federal authorities were somehow involved in his investigation. He claimed that papers relating to the FBI and Amato were stolen from his

office. He also supposedly complained to others that his computer had been tampered with.

Moreover, for reasons unknown to Shuman, another Richmond Detective began investigating the fire at Acola's. When that detective later participated in the indictment of Acola for the arson or his former restaurant, Shuman pulled him aside, yelled at him, and asked if the FBI "had his rear-end in a crack" or if he was working for Mike Scott.

Shuman then sought to bring another charge - a felony - against Amato. His notes state he believed Amato would not surrender on the trespass charge and he then asked Parcell to obtain phone records for Scott's house, for Scott's girlfriend's house, and for a cottage of Scott's aunt in the country. Although Scott had said that Amato was out of town, Shuman suspected Scott knew of his whereabouts. The phone records might (but did not) reveal long distant calls to and collect calls from Amato. In fact, Shuman continued to obtain phone records of Scott's home after Amato had surrendered. If Amato was found in another state he would not be extradited on the insignificant misdemeanor trespass charge, whereas a felony charge against Amato would guarantee extradition, ironically, by the FBI.

Later, Acola supposedly recounted to Shuman the January 21, 1992 lock-changing incident. According to Shuman's own notes, however, Acola never told Shuman that Amato had threatened him during that incident. Shuman maintains that Acola did tell him that he had felt threatened by Amato. Incredibly, the "threat" Acola perceived was that he would be beaten with a five-pound Genoa salami which Bilter had purchased from Acola. Shuman recounted Acola claimed such a beating would leave no marks.

Shuman took some information to Parcell in an effort to obtain an indictment against Amato. According to Parcell, the key evidence supporting an indictment was a statement Shuman attributed to Bilter - that Bilter saw "fear" in Acola's

eyes. Bilter, however, denies ever telling Shuman that he saw "fear" in Acola's eyes or that Acola was scared. Rather, Bilter told Shuman that Acola was mad.

Six months after the supposed extortion, while Acola was a fugitive from justice with the now added charge of arson, without Shuman interviewing any of the four officers present at the supposed extortion event, Shuman alone, presented a case to a Richmond Grand Jury and walked-out with an indictment in hand. Once indicted, Amato was instantly placed by Shuman (in violation of police department rules) on the City's "Ten Most Wanted" list, and a poster bearing his likeness was widely circulated. Amato surrendered on the charges, was released on a summons on the trespass charge, detained for ten hours, and then released on a $10,000 bond, demanded by Parcell - as Parcell stated at the bond hearing (and subsequently at Amato's expungement hearing) that "nobody knows who Amato is." The extortion charge was subsequently nolle prossed, and the trespass warrant dismissed, on Amato's motion.

J. **OTHER INCIDENTS** Shuman told at least four people that Amato set the fire at Acola's restaurant. On separate occasions (including to non-party disinterested policemen) Shuman stated that he had the gas can used to set the fire at Acola's with Amato's fingerprints on it, although he now admits that he never had such evidence. Shuman also, on two occasions, attempted to broker an arrangement for Scott to rent the restaurant building to the entity that Acola sold his business to.

ARGUMENT

I. THE ILLEGAL SEARCH In Amato v. City of Richmond, No. 95-1114 (4th Cir. March 5, 1996), the Fourth Circuit issued an unpublished, *per curiam*, opinion upholding a District Court decision which conflicts with decisions of

other Courts of Appeal.

As the District Court below noted, there is a conflict among the federal courts as to which party in a §1983 case bears the burden of proving allegedly consensual searches. The Second, Fifth and Ninth Circuits place the burden on the plaintiff to disprove a defendant's claim of consent to the search. See Ruggiero v. Krzeminski, 928 F.2d 558, 563 (2nd Cir. 1991); Crowder v. Sinyard, 884 F.2d 804, 824-26 (5th Cir. 1989); Larez v. Holcomb, 16 F.3d 1513, 1517 (9th Cir. 1994). The Third, Sixth, and Seventh Circuits, and U.S. District Courts in Minnesota and the Northern District of Iowa assign the burden of proof to defendants who claim that consent justified a warrantless search. See Karnes v. Skrutski, 62 F.3d 485, 495 (3rd Cir 1995); Tarter v. Raybuck, 742 F.2d 977, 980-01 (6th Cir. 1984); McGann v. Northeast Illinois Regional Commuter Railroad, 8 F.3d 1174 (7th Cir. 1992); Huotari v. Vanderport, 380 F. Supp. 645, 648 (D. Minn. 1974), DePugh v. Smith, 880 F.Supp. 651 (ND Iowa 1995).

The Fourth Circuit permitted the District Court to apply an erroneous standard of review: "the evaluation of the record on consent, for purposes of summary judgment, must be guided by the fact that plaintiffs bear the burden of proof." Amato v. City of Richmond, 875 F.Supp. 1124, 1134(E.D. Va. 1994). The District Court justified its holding on grounds that the government properly bears the burden of proving consent in criminal cases because the government must prove its case beyond a reasonable doubt, but in the civil context the plaintiff should be required to prove all elements of the claim including a lack of consent. According to the District Court, treating the issue of consent differently in criminal and civil cases is justified because of the parties' overall burden of proof on the case. However, the District Court's mechanical approach to allocating the burden of proof on consent searches ignores the important constitutional considerations

that have guided the Supreme Court's decisions on consensual searches.

The standard for voluntary consent was established in Schneckloth v. Bustamonte, 412 U.S. 218, 223 (1973) where the Court cautioned against "mechanical" application of rules surrounding the voluntariness of consent. The Supreme Court made no reference to the government's overall burden of proof in a criminal case or to a claimant's burden of proof in a civil case. In fact, Schneckloth v. Bustamonte was a habeas corpus case, and like the present § 1983 suit, habeas corpus is a civil suit in which the petitioner, like these plaintiffs - petitioners, begins with the burden of proof. Had the Court adopted the view espoused by the District Court, this Court would have placed the burden of proving involuntary consent on the habeas corpus petitioner. Instead this Court held that once the petitioner establishes that a warrantless search took place, and the government relies upon consent to justify the search, the government bears the burden of proving voluntary consent. The context in which the question of voluntary consent arose, whether civil or criminal, was not a relevant factor to the Court. See also Malley v. Briggs, 475 U.S. 335, 344 (1986) where the government asked this Court to lower the standard of U.S. v. Leon, 468 U.S. 897 (1984) in §1983 cases. The Court refused, stating "we hold that the same standard of objective reasonableness that we applied in the context of a suppression hearing in Leon, defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest."

Rather than create different constitutional standards for consent searches in a civil or criminal context, the Court sought guidance from its confession cases, and noted that "'voluntariness' has reflected an accommodation of the complex of values implicated in police questioning." Schneckloth v. Bustamonte, Id. at 224. The Court recognized that similar values were implicated in the Fourth Amendment

context, specifically, "two competing concerns [which] must be accommodated in determining the meaning of a 'voluntary' consent - the legitimate need for such searches and the equally important requirement of assuring the absence of coercion." Id. at 226. The burden of proving free and voluntary consent was then assigned to the government because "the requirement of a 'voluntary' consent reflects a fair accommodation of the constitutional requirements involved." Id. at 229.

The lower federal courts must accept this "fair accommodation" and follow a consistent approach to proving consent in both criminal and civil cases because the constitutional considerations do not change according to the identity of the moving party. The important constitutional consideration is the Supreme Court's recognition that warrantless searches are per se unreasonable, "subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967). Those exceptions are "jealously and carefully drawn," Jones v. United States, 357 U.S. 493, 499 (1958), and "this is especially true when government authorities intrude into a person's dwelling." Huotari v. Vanderport, 380 F. Supp. at 648.

Decisions like Huotari accept Schneckloth's accommodation of constitutional principles and assign the government the burden of proving voluntary consent in §1983 cases because "the right of officers to thrust themselves into a home is ... a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance." Huotari v. Vanderport, 380 F. Supp. at 648. As Huotari does, the federal courts must look beyond the concerns of the parties in a particular case in order to give effect to society's interest in limiting warrantless searches. In both criminal and civil cases, the societal interest in prohibiting warrantless searches requires that the government prove the consenting party "freely and intelli-

gently [gave her] unequivocal and specific consent to the search, uncontaminated by any duress or coercion, actual or implied." United States v. Morrow, 731 F.2d 233, 236 (4th Cir. 1984).

In this case, the District Court assigned the burden of proof to the plaintiffs/petitioners because the Court found decisions like Huotari and Tarter v. Raybuck, 742 F.2d 977 (6th Cir. 1984) to be "unpersuasive." The Tarter decision was deemed unpersuasive because it placed the burden of proof on the government by invoking "a presumption against the waiver of constitutional rights." Id. at 980. The District Court recognized that such a waiver theory was rejected by Schneckloth in favor of a totality of the circumstances test. Decisions like Tarter, however, are very persuasive attempts to be faithful to Schneckloth's accommodation of conflicting constitutional principles.

Schneckloth declined to hold the government to proving a knowing and intelligent waiver of Fourth Amendment rights because of the unique operation of the Fourth Amendment exclusionary rule in criminal cases. The Schneckloth Court noted that unlike the Sixth Amendment right to counsel, which requires a knowing and intelligent waiver, waiver of Fourth Amendment rights is affected by the exclusionary rule which excludes otherwise relevant evidence and thus defeats the truth-seeking function of adjudication. See Malley v. Briggs, 475 U.S. 335, 344 (1986) ("While we believe the exclusionary rule serves a necessary purpose, it obviously does so at a considerable cost to society as a whole, because it excludes evidence probative of guilt"). Because of concerns over the truth-defeating effects of the exclusionary rule, Schneckloth refused to impose on the prosecution the heavy burden of proving that there was a knowing and intelligent waiver of Fourth Amendment rights. Schneckloth nonetheless placed the burden of proving voluntary consent upon the government. Once again, this Court resolved

conflicting constitutional principles by accommodating the favored rule requiring a non-coerced, knowing and intelligent waiver of constitutional rights when balanced against the disfavored consequences of the Fourth Amendment exclusionary rule.

This delicate balance of conflicting Fourth Amendment principles is nullified in this case by the District Court's decision to place multiple burdens on § 1983 plaintiffs. According to the District Court, the government is relieved of the need to prove waiver of a constitutional right, while at the same time, plaintiffs claiming that the government conducted an unreasonable search must prove a negative - the absence of voluntary consent. As Justice Marshall cautioned in Schneckloth "courts have traditionally been reluctant to require a party to prove negatives such as the lack of knowledge" or consent. Schneckloth v. Bustamonte, 412 U.S. at 286 (Marshall, J., dissenting).

The exclusionary rule is not applicable in § 1983 litigation, thus there is no need to apply what Schneckloth, 412 U.S. at 245 conceded was a "diluted form of waiver." In Malley v. Briggs, 475 U.S. at 344 the Court noted that unlike the societal costs associated with the exclusionary rule

> a damages remedy ... imposes a cost directly on the officer responsible ..., without the side effect of hampering a criminal prosecution. Also, in the case of the § 1983 action, the likelihood is obviously greater than at the suppression hearing that the remedy is benefiting the victim of police misconduct one would think most deserving of a remedy - the person who in fact has done no wrong, and has been arrested for no reason, or a bad reason.

Unfettered by the need to adjust Fourth Amendment

law to account for the exclusionary rule, Karnes v. Skrutski, 62 F.3d 485, 495 (3rd Cir 1995); Tarter v. Raybuck, 742 F.2d 977, 980-01 (6th Cir. 1984); McGann v. Northeast Illinois Regional Commuter Railroad, 8 F.3d 1174 (7th Cir. 1992); Huotari v. Vanderport, 380 F. Supp. 645, 648 (D. Minn. 1974); and DePugh v. Smith, 880 F.Supp. 651 (ND Iowa 1995), give appropriate effect to the general presumption against waiver of constitutional rights and represent the proper view of how to allocate the burden of proof in §1983 cases. First, the plaintiffs must initially prove that a warrantless search occurred and thus place themselves within the general rule that warrantless searches are per se unreasonable. Second, the burden of proving an exception to the general rule then rests upon the defendants who seek to justify conduct which is per se unreasonable. When government officials claim that they fall within a "jealously and carefully drawn" exception to the prohibition against warrantless searches, these government officials rightly bear the burden of proving the exceptional circumstances that justify their generally prohibited conduct. In placing the burden of proving consent on the government, Schneckloth v. Bustamonte, 412 U.S. at 228, invoked the "classic admonition" of Boyd v. United States, 116 U.S. 616, 635 (1886):

> constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon.

There remains only one concern unique to §1983

cases, and thus beyond the considerations resolved in Schneckloth. This Court has recognized the need to protect government officials from frivolous §1983 suits. However, this legitimate concern does not justify placing excessive procedural hurdles in the path of a §1983 plaintiff who has demonstrated the gravity of his claim by proving that a warrantless search occurred and that such warrantless searches are per se unreasonable. The present case is not the type of frivolous §1983 claim that troubles the courts or justifies summary judgment against the plaintiffs/petitioners. This case involves a decorated police officer (and the other petitioner with no criminal record) who was not suspected of nor charged with any crime. His home was searched without a warrant, without a modicum of probable cause, and in violation of police department policy requiring the execution of a written consent to search form, and requiring the reading of "The Police Officer Bill of Rights" before requesting permission to search an officer's home. Officer Scott has proven that he was the victim of a warrantless search of his home, and standing alone this states a §1983 claim worthy of careful scrutiny unless and until the government can prove that its warrantless entry was justified by some exception to the rule that warrantless searches are per se unreasonable. This Court's mandate to discourage warrantless searches dictates that those who conduct warrantless searches bear the burden of justifying their compelling need to engage in such prohibited practices.

Petitioners contend that the record in this case establishes that Scott never gave voluntary consent and thus the District Court's granting of the respondents' motion for summary judgment should have been reversed.

II. THE ARREST WARRANT The District Court's opinion affirmed by the Court of Appeals found that a private citizen, rather than a police officer, was responsible for

obtaining an arrest warrant even though there were six failed prior attempts to obtain a warrant, and despite the fact that the officer ultimately counseled the citizen on how to obtain a warrant. The holding that the private citizen was not acting at the police officer's behest, conflicts with Skinner v. Railway Labor Executives' Assoc., 489 U.S. 602, 614 (1989) which recognized that "whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities," a factual question inappropriate for resolution on a motion for summary judgment.

The District Court opinion affirmed by the Fourth Circuit conflicts with its previous recognition in Goodwin v. Metts , 885 F.2d 157, 164 (4th Cir. 1989) that "an officer cannot invoke qualified immunity where he 'did not avail himself of readily available information that would have clarified matters to the point that [the criminal charge] would have been flatly ruled out as factually unsupportable." Prior to the issuance of the arrest warrant for appellant Amato there had been eight determinations that the matter involved a civil dispute, that the complaining witness had bargained away all his possessory interests days before the incident, and that there was no probable cause for issuance of an arrest warrant. Nonetheless, a police officer counseled a private citizen as to how to obtain an arrest warrant from a Magistrate who had previously refused to issue the warrant. In reviewing a motion for summary judgment, the District Court overstepped proper bounds when it concluded that "there is no evidence that [the private citizen] was acting at [the police officer's] behest." The motion for summary judgment should have been denied because "there was evidence from which the jury could believe that [the officer] manipulated the process" and "worked to cause" the plaintiff's arrest. DeLoach v. Bevers, 922 F.2d 618, 621 (10th Cir. 1990).

The party opposing a motion for summary judgment need "only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). The District Court below ignored this point in holding that it was a private citizen (Acola) not Hosick, was not responsible for obtaining the arrest warrant for Amato.

The District Court's ruling that "the prime actor here was Acola," is not supported by the facts. The arrest warrant was based on an alleged trespass on the premises leased by Acola from Scott and his aunt. Amato entered the premises accompanied by his lawyer, Benson, and Arthur, who Amato requested to be present at the time of entry. When Hosick investigated the alleged trespass he was told by Arthur that this was a civil dispute, not a criminal matter. Magistrate Thomas also had ruled that this was a civil dispute and that "no warrant was going to be obtained due to the lack of probable cause." Benson also had informed (and provided a copy of the statute and case) Hosick of Virginia Code §18.2-119 and Reed v. Commonwealth, 6 Va. App. 65, 71, 366 S.E.2d 274 (1988), which arose from the Circuit Court for the City of Richmond, and established that "one cannot be convicted of trespass when one enters or stays upon the land under a bona fide claim of right. ... A good faith belief that one has a right to be on the premises negates criminal intent." Additionally, Benson had provided Hosick with the contract of sale for all of Acola's possessory rights and interests, for substantial consideration, entered into five (5) days prior to the alleged trespass. Hosick, undeniably was aware, from his own superior knowledge, that Acola had no interest, rights, or standing to bring the trespass charge. Hosick himself wrote that the alleged trespass charge was "unfounded," and closed his investigation.

Hosick subsequently reviewed the facts surrounding

the alleged trespass with The Richmond's Commonwealth Attorney, who on two separate occasions told him that "there is no probable cause to believe that [Amato] had intent to commit a felony in the presence of the police. [The Commonwealth Attorney] advised against obtaining any warrant for this case," and insisted that "there's no probable cause to obtain a burglary warrant including the lesser offense of trespass." At some unspecified subsequent date, Hosick presented the information surrounding the alleged trespass to Magistrate Browning, while Acola discussed the matter with an unidentified Magistrate. Both Magistrates refused to issue a warrant.

At a minimum, this issue was not appropriate for resolution on a motion for summary judgment because "whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Governments participation in the private party's activities." Skinner v. Railway Labor Executives' Assoc., 489 U.S. 602, 614 (1989). This present case parallels the situation in DeLoach v. Bevers, 922 F.2d 618, 621 (10th Cir. 1990) where the court denied a motion for summary judgment because "there was evidence from which the jury could believe that [the officer] manipulated the process" and "worked to cause" the plaintiff's arrest. See also Moore v. Marketplace Restaurant Inc., 754 F.2d 1336, 1345 (7th Cir. 1985) (summary judgment denied because "it is proper for the jury to consider all the evidence, including questions regarding the sufficiency of the deputies' investigation ..., in determining whether there was enough evidence to establish probable cause to arrest").

In two recent cases, the Ninth Circuit and the Eight Circuit have held **as a matter of law** that contract disputes like the landlord tenant dispute in this case, cannot give rise to probable cause to arrest. See Allen v. City of Portland, 1995 WL 747768 (9th Cir. 1995) ("by its definition, probable cause

can only exist in relation to criminal conduct. It follows that civil disputes cannot give rise to probable cause. .... Therefore, we hold that as a matter of law, Officer Fort arrested the plaintiff without probable cause and in violation of her Fourth Amendment rights"); Peterson v. City of Plymouth, 60 F3d 469, 476 (8th Cir. 1995) ("knowledge of plaintiff's reasonable and actual claim of right [to the property] put officer Ridgley on notice that the dispute was a civil matter not involving criminal intent").

Under the facts of this case the respondents are not entitled to qualified immunity because in the words of the Seventh Circuit, they failed to exercise simple common sense. Moore v. Marketplace Restaurant Inc., 754 F.2d at 1346. No police officer could believe that it was objectively reasonable go to the extra-ordinary lengths pursued by Hosick in what was clearly a landlord tenant dispute. If Hosick had been acting in objective good faith, he would have submitted all relevant facts to the magistrate and would have been prepared to respect whatever conclusion was reached by a magistrate given all pertinent facts of the case. Instead, **Hosick ignored eight prior determinations that probable cause was lacking**; determinations made by four Magistrates, The Richmond Commonwealth Attorney, a lawyer, three police officers, one present at the scene of the alleged trespass. Hosick ultimately used his agent, Acola, and withheld crucial information which should have been presented to the magistrate who finally issued the arrest warrant. The Fourth Circuit Court of Appeals previously recognized, in Goodwin v. Metts, 885 F.2d 157, 164 (1989) that "an officer cannot invoke qualified immunity where he 'did not avail himself of readily available information that would have clarified matters to the point that [the criminal charge] would have been flatly ruled out as factually unsupportable."

Petitioners additionally contend that the District Court below in its Memorandum Opinion Appendix A6-A62

infra; (i) treated all offerings of respondents counsel as factual, (ii) treated all offerings of petitioners as "alleged", (iii) disregarded all affidavits and other testimony of non-party's supporting petitioners' complaints', (iv) accepted misleading, incorrect, and factually unsupportable statements of respondents' counsel as fact, (v) admitted facts not in evidence into its Memorandum Opinion and, (vi) gave effect to thrice removed hearsay evidence. Petitioners further contend that the District Court appeared biased in its treatment of the evidence adduced by petitioners which clearly and concisely established the matters pleaded in their Complaints. The misrepresented facts proffered to the Court by respondents' counsel made their way into the Courts' Memorandum Opinion.

Additionally, in mid March 1995, some three months after the District Court's Memorandum Opinion, petitioners received a telephone call from a person who identified herself as an employee of McGuire, Woods, Battle & Boothe. The caller asked petitioners if they were aware that "Judge Payne" was formerly a member of that firm. The caller also advised petitioners that Judge Payne still had financial ties to a partnership of members of that firm. The caller made some additional serious allegations.

Petitioners discussed between themselves the allegations proffered and the detailed basis of the information imparted. Petitioners elected to make additional, discreet, inquiry regarding the information related.

Eleven days after petitioners' initial inquiries, counsel for petitioners received an unsolicited letter from the Honorable Robert E. Payne, the District Court judge in this matter, which is set out the Appendix *infra* at pages A150-153.

Petitioners, on advice of counsel, did not pursue the matter. However, most recently it was learned that; the partnership Judge Payne maintains an "equity position" in, is required to file a tax return under the Internal Revenue Code

of the United States, § 761. As this Court is aware, "Every **partnership has to file a return, regardless of the amount of income**[4]." "Every partnership required to file a return must furnish to every partner a copy of certain information shown on the partnership return (Schedule K-1)." (Temporary Reg. § 1.6031(b)-1T(a)(3))."

Petitioners, are at an utter loss to determine how Judge Payne could consider his partnership interest an "inchoate interest[5]" as set forth in his letter to counsel, when he acknowledges a supplemental distribution in 1992, received in 1993 - for an undisclosed sum. The distribution admitted must have been reported on Forms K-1. Additionally, each subsequent year, Judge Payne should have received a K-1 for this partnership, which should have been reported on his Federal Income Tax return. Had petitioners known of this interest in the real property McGuire, Woods, Battle and Booth, especially since McGuire, Woods, Battle and Boothe took over representation of respondents after Judge Payne was being assigned the case, petitioners would have instantly moved the Court to recuse itself. Judge Payne's explanation in his letter of April 17, 1995, contradicts itself. The Judge states "**My share** [emphasis added] in NCA currently is 1.442500%...".

Judge Payne's financial interest should have been grounds for the Court to *sua sponte* recuse itself. Judge Payne's financial interest does not pass the "mere appearance" test mandated by all bar associations and the Supreme Courts of all states. Judge Payne knew or should have known of his ongoing financial association with his former firm, which was

---

[4]CCH Reports; ¶36,589.01

[5]From Black's Law Dictionary, 5th Ed.,; **Inchoate Interest**. An interest in real estate which is not a present interest, but which may ripen into a vested estate, if not barred, extinguished, or divested.

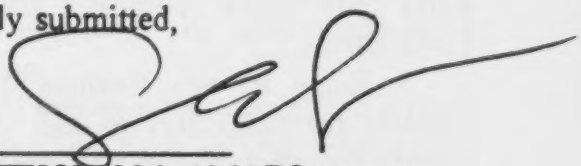
now defending respondents, was a clear conflict of interest.

CONCLUSION

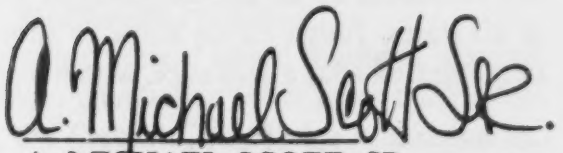
The Panel opinion in Amato v. City of Richmond, No. 95-1114 (4th Cir. March 5, 1996), conflicts with decisions of other Courts of Appeal. The Supreme Court must provide guidance to the lower counts by determining whether the burden on voluntary consent varies according to the civil or criminal nature of the proceeding, or whether the constitution mandates a consistent approach to proving consent to all Fourth Amendment searches.

This Court should also determine whether the Fourth Circuit's grant of summary judgment on disputed facts violates this Court's earlier recognition that "whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities.' Skinner v. Railway Labor Executives' Assoc., 489 U.S. 602, 614 (1989).

Respectfully submitted,



ANTHONY M. AMATO, *pro se*



A. MICHAEL SCOTT, SR., *pro se*

7400 Beaufont Springs Drive #500
Richmond, Virginia 23225-5519
(804) 330-0006

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-1114

ANTHONY M. AMATO; MICHAEL SCOTT, SR.,

Plaintiffs - Appellants,

versus

CITY OF RICHMOND; W. R. SHUMAN, Detective, Individually as a police officer for the City of Richmond; ROBERT HOSICK, Detective Sgt., Individually and as a police officer for the City of Richmond; TERESA P. GOOCH, Captain, Individually and as a police officer for the City of Richmond; LAUREL MILLER, Major, Individually and as a police officer for the City of Richmond; PHILIP MANGANO, Detective Sgt., Individually and as a police officer for the City of Richmond, MARTY M. TAPSCOTT, Chief, Individually and as a Police Officer for the City of Richmond,

versus

UNITED STATES OF AMERICA,

Party in Interest.

Appeal from the United States District Court for the Eastern

District of Virginia, at Richmond. Robert E. Payne, District Judge. (CA-94-193)

Argued: January 31, 1996 Decided: March 5, 1996

Before WIDENER, LUTTIG, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ARGUED: Ronald J. Bacigal, Youth Advocacy Clinic, T.C. Williams School of Law, UNIVERSITY OF RICHMOND, Richmond, Virginia, for Appellants. Scott Charles Oostdyk, MCGUIRE, WOODS, BATTLE & BOOTHE, Richmond, Virginia, for Appellants. **ON BRIEF**: Michael J. Kelly, Richmond, Virginia, for Appellants. Kenneth D. Crowder, MCGUIRE, WOODS, BATTLE & BOOTHE, Richmond, Virginia; William Joe Hoppe, Senior Assistant City Attorney, Richmond, Virginia; Michael HuYoung, Richmond, Virginia; Jane Chittom, SHUFORD, RUBIN & GIBNEY, Richmond, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Appellants, Anthony M. Amato and A. Michael Scott,

Sr., appeal from the district court's grant of summary judgment in favor of the defendants on appellants' complaints alleging violations of 42 U.S.C. § 1983 and of various state laws. We have reviewed the district court's opinion, the record, the briefs, and the contentions advanced by both parties at oral argument and find no reversible error. Accordingly, we affirm the decision of the district court on the reasoning of that court. Amato v. City of Richmond, 875 F. Supp. 1124 (E.D. Va. 1994).

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

ANTHONY M. AMATO
and
A. MICHAEL SCOTT, SR.,

Plaintiffs,

v. Civil Action No. 3:94cv193

CITY OF RICHMOND, et. al.,

Defendants.

ORDER

For the reasons stated in the Memorandum Opinion issued herewith, it is ORDERED that:

(1) the motions for summary judgment on Counts I and II of the Amended Complaint filed by A. Michael Scott, Sr. and granted and the claims therein asserted are dismissed with prejudice;

(2) the motions for summary judgment on Counts I, II and III of the Second Amended Complaint filed by Anthony M. Amato are granted and the claims therein asserted are dismissed with prejudice;

(3) the motions for summary judgment on Count III of the Amended Complaint filed by A. Michael Scott, Sr. and on Count IV of the

Second Amended Complaint filed by Anthony M. Amato are denied and the claims therein asserted are dismissed without prejudice.

The Clerk is directed to send a copy of this Order to all counsel of record.

It is so ORDERED.

Robert E. Payne

Richmond, Virginia
Date: Dec. 15 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

ANTHONY M. AMATO
and
A. MICHAEL SCOTT, SR.,

Plaintiffs,

v.

CITY OF RICHMOND,

W. R. SHUMAN, Detective,
Individually and as a
police officer for the
City of Richmond

ROBERT HOSICK, Detective,
Sergeant, Individually and
as a police officer for
the City of Richmond

TERESA P. GOOCH, Captain,
Individually and as a
police officer for the
City of Richmond,

LAUREL MILLER, Major,
Individually and as a
police officer for the
City of Richmond,

PHILIP MANGANO, Detective
Sergeant, Individually and
as a police officer for the

City of Richmond,

MARTY M. TAPSCOTT, Chief,
Individually and as police
chief for the City of Richmond,

Defendants.

MEMORANDUM OPINION

Anthony m. Amato, a professional informant, and A. Michael Scott, a police officer employed by the Richmond Police Department, each instituted actions against the City, its Chief of Police and several police officers. The Chief of Police and the officers are named in their individual and official capacities. The actions were consolidated for discovery and trial because they involve some common issues of fact and law.

In Count I of their respective complaints, Scott and Amato seek recovery, under 42 U.S.C. § 1983, against Major Miller, Captain Gooch, and Detective Sergeants Hosick and Mangano for alleged violations of the Fourth Amendment. These claims arise out of an allegedly nonconsensual entry into the residence which Scott and Amato shared. The stated purpose of the entry was to arrest Amato pursuant to a warrant on a misdemeanor trespass charge. Amato also claims that certain of his property was seized during this search and he seeks damages on account of the allegedly unlawful seizure of that property as well as the allegedly unlawful search.

Count II of Scott's complaint and Count III of Amato's complaint assert precisely the same claims against the same four defendants as asserted in Count I, except that these are asserted as violations of state law, Va. Code Ann. § 19.2-59.

Count II of Amato's complaint asserts a claim under 42 U.S.C. §1983 for violation of the Fourth Amendment as the consequence of his voluntary surrender to arrest on charges of trespass and extortion. Amato names Miller, Gooch, Hosick and Shuman as defendants in Count II.[1]

Count III of Scott's complaint and Count IV of Amato's complaint assert state tort claims for intentional infliction of emotional distress. Miller, Gooch, Hosick, Shuman, Chief of Police Tapscott and the City are named as defendants in these counts.

Following full discovery, all defendants moved for summary judgment on all claims. The parties have briefed and argued their positions.

The facts that spawned these actions are largely in dispute. For purposes of summary judgment, plaintiffs are entitled to have the factual disputes resolved in their favor and to the benefit of the inferences which permissibly may be drawn from the facts. Factual recitations in this opinion are faithful to this charge, but the record reflects that the defendants vigorously deny most of the factual assertions on which the plaintiffs base their claims.

Each claim generally is predicated on a discrete set of facts and the facts will be set forth in detail in the discussion of the claims to which they are most pertinent. However, those discussions and the particularized facts are best understood if viewed against the general background which follows.

---

[1] The thrust of Count II as originally pleaded was a deprivation of due process under the Fourteenth Amendment, but Amato has abandoned that claim in view of the decision in Albright v. Oliver, 114 S. Ct. 807, 813-14 (1994).

GENERAL BACKGROUND

Amato and Scott met several years ago when Amato was working as an undercover operative for the Federal Bureau of Investigation in its investigation respecting gambling and narcotics in the Richmond area. Scott served as a member of the federal-state task force which conducted those investigations. When the investigations were concluded in 1988, Amato moved away from Richmond and continued his employment as an undercover operative for various federal agencies. In December 1991, Amato, who was between assignments, returned to Richmond and renewed his association with Scott. Shortly thereafter, Amato and Scott entered into an agreement pursuant to which Amato rented a bedroom in, and access to the common areas of, Scott's residence in Chesterfield County.[2]

For some time, a partnership in which Scott was a general partner owned a building in Richmond which in 1991 was leased to Kenneth Acola, who operated Acola's Restaurant on the premises. In January 1992, Acola was delinquent in the rental payments due under the lease and Scott asked Amato to assist the partnership's lawyer, W. Todd Benson, in collecting the delinquent rent and securing possession of the premises. At the time, Amato was using the alias "Dan Salerno" and his true identity was not widely known.

On January 21, 1992, Amato and Fred Bilter, a retired Richmond firefighter whose help Scott enlisted, went to Acola's Restaurant to serve Acola with an eviction letter authored by Benson and to change the locks (the "Lock

---

[2] The record does not contain a written lease agreement nor does it otherwise reflect the terms of the alleged lease. The defendants, however, do to contest that Amato rented living space in Scott's home.

Changing Incident"). They served the letter and Amato changed the locks. Acola "became upset and called the police." Several police officers arrived, led by Gordon Overstreet, who instructed Acola to calm down and directed Amato to replace the locks. When this was accomplished, Overstreet reportedly asked Acola either if he had been threatened or whether everything was satisfactory, or both. Acola reportedly responded that he had not been threatened or that he was satisfied, or both. However, Acola expressed concern that the police would favor their follow officer, Scott, in any ensuing disputes or proceedings respecting possession of, or access to, the premises.

In March 1992, Scott became apprehensive that Acola might carryout a previous threat to damage the leased premises and again enlisted Amato to help Benson attend to the matter. In furtherance of that assignment, on March 22, 1992, Amato and Benson, having first requested the Richmond Police Department to have an officer meet them at Acola's Restaurant, visited the premises to determine whether Acola was fulfilling the threat (the "Forced Entry Incident"). When Officer Timothy Arthur met Amato and Benson at the restaurant, they discovered that the locks had been changed. Amato forced open the upstairs door. All three men entered the premises and discovered that the premises had been damaged. Using wood taken from elsewhere on the premises, Amato secured the door through which he forcibly entered.

Acola subsequently filed a complaint against Amato and Benson for burglary and breaking and entering. He also filed with the Richmond Police Department a complaint alleging that Scott had improperly used his police powers.

The complaint against Scott was referred for investigation to the Internal Affairs Department. Detective Charles R. Sipple headed the Internal Affairs investigation of Scott.

Investigation of the burglary and breaking and entering complaint originally was assigned to two officers in Scott's unit. However, Miller become concerned that this could create the appearance of departmental favoritism towards Scott which, because of Acola's complaint against Scott, Miller wanted to avoid. Accordingly, Miller directed Gooch to reassign the investigation of the Forced Entry Incident to an officer who was not in Scott's unit. Gooch assigned the job to Hosick on March 31, 1992. The details of Hosick's investigations are described more particularly in section III below. So too are the circumstances under which Acola obtained on April 10, 1992 a warrant for the arrest of Amato on a charge of trespass as a result of the Forced Entry Incident on March 22, 1992.

On April 16, 1992, Scott and other officers were detailed by Miller to serve the arrest warrant on Amato at the residence occupied jointly by Amato and Scott. Under circumstances set forth in section I below, the officers entered the residence to arrest Amato.

On April 22, 1992 at approximately 3:15 a.m., Acola's Restaurant was destroyed by a fire set by an arsonist. The investigation of that offense was assigned to Detective Shuman, the fire investigation unit officer on duty when the fire occurred. During that investigation, Shuman reviewed the events that had taken place at the restaurant in January and March 1992 and arrived at the conclusion that Amato had threatened Acola. Shuman communicated this information to William J. Parcell, III, Assistant Commonwealth's Attorney for the City who, through testimony by Shuman, presented a charge of extortion against Amato to the grand jury which, on July 1, 1992, returned an indictment against Amato.

On August 6, 1992, Amato surrendered to arrest on both the extortion charge and the trespass charge. He was detained for approximately ten hours and then released on a

$10,000 bond on the extortion charge. The extortion charge was subsequently dismissed upon entry of a nolle prosequi.

The foregoing events and Scott's reassignment from the detective division to street patrol in April, 1992 lie at the core of the claims asserted by Amato and Scott. The alleged motivations for these acts also are central to the plaintiffs' theory of their case. Here too, the charges are highly disputed. In sum, it is the plaintiffs' theory that the search and the arrest of Amato were undertaken for the purpose of exerting emotional pressure on Amato and Scott to force them to disclose whether they were involved with federal authorities in investigating police corruption in the City and to establish physical control over Amato to determine his true identity.

Plaintiffs point to a number of incidents which, they say, evince improper motivation for the constitutional deprivations they allege. Specifically, on April 9, Hosick is alleged to have asked Scott whether he and Amato were investigating City policy officers. On August 6, when Amato surrendered, Hosick is alleged to have asked Amato whether he was working for the FBI or the IRS and to have told Amato that "this whole mess will be over in a day or two" if Amato disclosed the agency for which he was working. Amato also alleges that Hosick said: "Tony, [Amato] we know you didn't do anything wrong but we need to get Mike [Scott] and know you have the goods on him. Help us and we'll get you out of this mess."

Plaintiffs also rely on remarks in a report prepared by Shuman for the Commonwealth's Attorney: "I would like to get a warrant for Salerno [Amato] on another matter that is a felony and I also have other things that I will not put in a letter that will help my first case and may, indeed, prove the arson case." Also, several months after the issuance of the trespass warrant in April and the return of indictment for

extortion in July, Shuman is alleged to have said: "Well, I'm going to get him [an alleged reference to Amato] any away," and "I got it cleared. They're dirty." Finally, in 1994, after this action was filed, Shuman is said to have stated that Scott was a "lousy no good criminal;" that Amato and Scott were "scumbags" and that he would "burn their asses."

Finally, plaintiffs find significant certain subjective impressions of Detective Sipple who was in charge of the Internal Affairs investigation of Acola's complaint against Scott. Sipple testified that he felt, within himself, pressure to find a violation of police procedure by Scott. This impression arises from two incidents. First, before Sipple completed the investigation, he allegedly told Miller that "things looked good for Scott" to which Miller allegedly responded that he thought there were violations and trusted that a proper investigation would disclose them. Also, Sipple was told that Miller expressed to Sipple's boss the view that Sipple was biased and suggested that the investigation be reassigned.

The defendants deny all of these assertions; but, for summary judgment purposes, they must be taken as having been said and plaintiffs are entitled to have the permissible inferences drawn in their favor. Plaintiffs contend that this evidence could be construed as supporting an inference that the search and the arrest of Amato on trespass and extortion charges were prompted by an ulterior motive on the part of Miller, Gooch, Hosick and Shuman, and that the Chief of Police knew of the motive and did not stop the conduct of which plaintiffs complain.

This evidence makes no difference in a Section 1983 action if, for reasons independent of the evidence described above, the plaintiffs have suffered no deprivation of federally bestowed rights. If Scott consented to the search and there was probable cause for the charges against Amato, the

plaintiffs have suffered no deprivation and any intent to cause a deprivation would be irrelevant. Likewise, if the challenged conduct did not cause a deprivation, evidence of what motivated the conduct is irrelevant. Nor is ill-will or ulterior motive relevant to the applicability of qualified immunity.

Against this general background, the court turns to a consideration of each claim and, in so doing, will further explicate the factual record on which each claim is based, again according to the plaintiffs the benefit of all factual disputes and the inferences which may permissibly be drawn from the facts construed in their favor.

DISCUSSION

Summary judgment is to be rendered "if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Under subsection (e) of Rule 56:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set fourth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56 (e).

It is the responsibility of the party seeking summary judgment to inform the court of the basis for its motions, and to identify the parts of the record and affidavits, if any, which

it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Pocahontas Supreme Coal Co. v. Bethlehem Steel, 828 F.2d 211, 216 (4th Cir. 1987). "[W]here the nonmoving party will bear the burden of proof at a trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories and admissions on file.'" Celotex Corp. v. Catrett, 477 U.S. at 324. The moving party may also use affidavits to support its motion. In either event, the non-moving party must go beyond the pleadings and, by citing its own affidavits or by citing "'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Id. Opposition to a properly documented summary judgment motion may not be based solely on the pleadings.

The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis added). It is the function of the district court not to weigh the evidence, but to determine whether there is a genuine issue for trial and "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 249 (citations omitted) (emphasis added). Hence, summary judgment is appropriate if the "evidence is merely colorable" or "is not significantly probative." Id. at pp. 249-50 (citations omitted). The standard for summary judgment mirrors the standard for judgment as a matter of law under Fed. R. Civ. P. 50(a), the principal difference being procedural. Id. at 251. And, "[W]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts."Matsushita Elec. Inc. Co., Ltd. v. Zenith Radio Corp.,

475 U.S. 574, 586-87 (1986) (citations omitted). The non-moving party, however, "need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial." Anderson v. Liberty Lobby, Inc., 477 U.S. at 257. The district court also "must view the evidence presented through the prism of the substantive evidentiary burden." Id. at 254.

Furthermore, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. at 255; McKinney v. Board of Trustees of Mayland Community College, 955 F. 2d 924, 928 (4th Cir. 1992). Summary judgment is appropriate only if, upon consideration of the record as a whole, a reasonable trier of fact could not find for the non-movant. Allstate Fin. Corp. v. Financorp, Inc., 934 F.2d 55, 58 (4th Cir. 1991). However, where a faithful examination of the record establishes the absence of a genuine issue of material fact, it is "the affirmative obligation of the trial judge to prevent factually unsupported claims and defenses from proceeding to trial." Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987) (citations omitted); see also, Guiness PLC v. Ward, 955 F.2d 875, 883 (4th Cir. 1992).

Although the defendants seek summary judgment on the ground that they deprived the plaintiffs of no constitutional right, all but the City also have asserted a qualified immunity defense to all federal claims.[3] That defense is available if their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Because qualified immunity is "an immunity from suit rather than a mere defense to liability,"

---

[3] The City is not named as a defendant in the federal claims. Also, the City is not entitled to the protection of qualified immunity.

it is "effectively lost if a case is erroneously permitted to go to trial." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). Harlow's focus on objective reasonableness was expressly driven by a desire to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." Harlow, 457 U.S. at 818.

The court may determine on a motion for summary judgment "not only the currently applicable law, but also whether that law was clearly established at the time an action occurred." Harlow, 457 U.S. at 818. Whether the law was clearly established turns on whether "contours of the right" were "sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987).

These principles control resolution of the motions for summary judgment.

I

The Search and Seizure Federal Claims

A. Amato's Claim For Seizure of Property

Count I of Amato's complaint seeks damages for an allegedly illegal search and seizure. The seizure allegedly occurred during the April 16 search of the residence. The only evidence offered to prove the seizure is Amato's testimony that several items were missing from his bedroom when he returned to the residence four months later. The only evidence to link any defendant with an allegedly missing item is an allegation that the police department learned of a code name used by Amato, a name allegedly appearing on a fax cover sheet seized during the search.

Scott testified at deposition that none of the officers

who participated in the search left the residence in possession of any items from the premises. Amato, however, describes the totality of items allegedly seized as too large to be concealed on the person of the officers. Amato's claim of unlawful seizure cannot survive in light of this evidence. Thus, Amato's Count I assumes the same dimensions as Count I of Scott's complaint: an allegedly unlawful search of the residence on April 16, 1992.

B. The Unlawful Search Claims

Section 1983, which imposes civil liability on any person who, under color of law, deprives another of federal constitutional rights, or statutory rights, "'is not itself a source of substantive rights,' but merely provides' a method for vindicating federal rights elsewhere conferred.'" Albright v. Oliver, 114 S. Ct. 807, 811 (1994) (citing Baker v. McCollan, 443 U.S. 137, 144, n. 3 (1979)). Therefore, "[t]he first step in any such claim is to identify the specific constitutional right allegedly infringed." Albright, 114 S. Ct. at 811. The federal right on which Scott and Amato base the Section 1983 claim in Count I is the Fourth Amendment's guarantee of freedom from unreasonable searches.

To succeed on Count I, Amato and Scott must prove by a preponderance of the evidence that : (1) Miller, Gooch, Hosick or Mangano engaged in conduct which deprived plaintiffs of a federal Constitutional right by subjecting them to an unreasonable search of their dwelling; (2) those defendants were acting under color of Virginia law; and (3) the acts of those defendants proximately caused the damages plaintiffs claimed to have sustained. 3 Devitt, Blackmar & Wolff, Federal Jury Practice and Instructions § 103.03. See Kentucky v. Grahm, 473 U.S. 159, 166 (1985); McDonald v. Dunning, 760 F. Supp. 1156 (E.D. Va. 1991).

It is not disputed that entry of the residence was taken

under color of state law. The necessary inquiry is whether the search was lawful. To establish an unlawful search, Amato and Scott must prove that the search on April 16 was not authorized by a warrant, be exigent circumstances of by consent. Steagald v. United States, Practice and Instructions, §103.02. There is no claim of exigency and there was no search warrant.

Warrantless searches are presumptively unreasonable. See Payton V. New York, 445 U.S. 573, 586 (1980). However, voluntary consent is a universally recognized exception to this presumption. Katz v. United States, 389 U.S. 347 (1967). Although the defendants concede that the search was warrantless, they contend that it was constitutionally valid because it was based on Scott's voluntary consent.

Consent is permission to enter a premises communicated by someone who objectively manifests authority to give permission to enter. See Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973). For consent to justify a warrantless search, the consenting party must "freely and intelligently [give his] unequivocal and specific consent to the search, uncontaminated by any duress or coercion, actual or implied." United States v. Morrow, 731 F.2d 233, 236 (4th Cir.) cert. denied, 467 U.S. 1230 (1984) (citing United States v. Vickers, 387 F.2d 703, 706 (4th Cir. 1967)), cert. denied, 392 U.S. 912 (1968)).

1. The Burden Of Proof

In a section 1983 civil action, the burden of proving involuntary consent rests on the plaintiffs. Ruggiero v. Krzeminiski, 928 F. 2d 558, 563 (2nd Cir. 1991) (As to consent in 1983 action, the "ultimate risk of nonpersuasion must remain squarely on the plaintiff in accordance with established principles governing civil trials"); Crowder v.

Sinyard, 884 F.2d 804, 824-26 (5th Cir. 1989), cert. denied, 496 U.S. 924 (1990) (burden of proof does not shift and plaintiff must prove that state officials conducted not only a warrantless search but a warrantless search without authorization under an exception to the warrant requirement);[4] Isidore Silver, Police Civil Liability § 8.06[5][d][i][B] (1994) ("[a]lthough a warrantless search is presumptively unreasonable, this presumption does not create a prima facie civil cause of action and the burden of proof always remains with plaintiff); see also Larez v. Holcomb, 16 F.3d 1513, 1517 (9th Cir. 1994) (in a section 1983 action charging illegal seizure of a person, plaintiff "at all times had the ultimate burden of proving to the jury that she had been seized unreasonably in violation of the Fourth Amendment"). The reasoning of the Second, Fifth and Ninth Circuits is persuasive that the burden of proving involuntary consent in a civil action, under Section 1983, is allocated to the plaintiffs.

Citing authority from criminal cases, Scott and Amato contend that the burden of proving voluntariness of consent rests on the defendants. Those authorities do not control a civil action because the issue of consent arises in a fundamentally different context in a civil action. Specifically, in a criminal case the government has the burden of proving its case beyond a reasonable doubt. Consequently, if the government seeks to use evidence obtained through allegedly consensual search, the government necessarily bears the burden of proving voluntary consent because that is part of the burden allocated to it. In the civil context, however, the plaintiff has the burden to prove all elements of the claim.

---

[4] The Supreme Court's decision in Horton v. California, 496 U.S. 128, 130 (1990) abrogated Crowder insofar as Crosder limited the plain view doctrine to inadvertent discoveries. Horton does not affect those parts of Crowder's holding cited herein.

One of those elements in a Section 1983 action is that the action violated a federal right. This burden is not fulfilled by simply asserting that a search occurred, or event hat a warrantless search occurred, because such a search could be within the law. See Crowder, 824 F.2d at 824-26.

The fact that warrantless searches are presumptively unreasonable operates in a civil case only to shift the burden of production on the issue of voluntary consent, not the burden of persuasion. Ruggiero, 928 F.2d at 563. Therefore, once a plaintiff establishes a warrantless search, a defendant must offer evidence that the search was lawful, notwithstanding the absence of a warrant. This can be done by offering evidence of consent which is an exception to the warrant requirement. However, this does not alter the fundamental principle that a civil plaintiff bears the ultimate risk of nonpersuasion on an element of his case. Id.

In this case, the defendants have presented sworn testimony that Scott was trained in the law of the Fourth Amendment, that he opened the door with his own key, and that no threats were made or coercive action taken to secure his consent. This fulfills the defendants' burden of production on the issue of voluntary consent. It therefore falls upon Scott and Amato to bear the ultimate burden of persuasion that Scott's actions did not constitute voluntary consent. Accordingly, under Anderson v. Liberty Lobby, 447 U.S. 242 (1986), the evaluation of the record on consent, for purposes of summary judgment, must be guided by the fact that the plaintiffs bear the burden of proof.

At least two cases have held that the defendant bears the burden of proving consent in a Section 1983 action. Tarter v. Raybuck, 742 F.2d 977, 980-81 (6th Cir. 1984), cert. denied, 470 U.S. 1051 (1985); Huotari v. Vanderport, 380 F. Supp. 645, 648 (D. Minn. 1974). However, the court finds these cases less persuasive than those decided by the

Second, Fifth and Ninth Circuits.

In Tarter, the Sixth Circuit held that the burden is on the defendants to prove that the plaintiff voluntarily waived his constitutional rights by consenting to a search, because there is a presumption against the waiver of rights. Tarter is unpersuasive for two reasons. First, the Fourth Circuit does not determine consent in terms of waiver of rights and the presumption against waiver. Instead, it looks at the totality of the circumstances. United States v. Poole, 718 F.2d 671, 674 (4th Cir. 1983). Second, the better response to the fact that warrantless searches are presumptively unreasonable it to require the defendant to produce evidence of voluntary consent, leaving the plaintiff the ultimate burden of non-persuasion. To hold otherwise would alter the fundamental burden of proof in a civil case and would allow civil plaintiffs to prevail by simply pleading, rather than proving, that the search violated his rights.

In Huotari, a Minnesota district court held that "defendants' reliance on the defense of consent to validate the search places upon them the burden of proving that consent was, in fact, freely and voluntarily given." Huotari, 380 F. Supp. at 648. The court does not give the basis for this assertion, and for the reasons stated respecting Tarter the court finds Huotari unpersuasive.

2. Voluntariness

In Schneckloth v. Bustamonte, 412 U.S. 218 (1973), the Supreme Court articulated the test for voluntary consent holding that:

> [W]hen the subject of a search is not in custody and the state attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that the consent was in fact voluntarily given,

and not the result of duress or coercion, express or implied.

Id. at 248 (emphasis added). Schneckloth also explained that "the question whether consent to a search was on fact 'voluntary' or was the product of duress or coercion, express of implied, is a question of fact to be determined from the totality of all of the circumstances." Id. at 227. This test is subjective to the extent that is turns on whether the consenting individual actually gave his consent freely and voluntarily. See United States v. Wilson, 895 F.2d 168, 171-72 (4th Cir. 1990) (holding that "the determination of consent is subjective" and "'determined by the totality of all the circumstances'") (citations omitted).

Relying on the Supreme Court's decision in Florida v. Jimeno, 500 U.S. 248 (1991), the defendants contend that the an objective standard governs the determination of voluntary consent. In Jimeno, the Supreme Court held that "[t]he standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness -- what would the typical reasonable person have understood by the exchange between the officer and the suspect." Id. at 249 (emphasis added).

The scope of consent and the voluntariness of consent are two distinct issues. Under Schneckloth, whether consent was "in fact voluntary," based on the totality of all of the circumstances, does not turn solely on objective manifestations. Jimeno does hold not otherwise.

Defendants also rely on United States v. Mendenhall, 446, U.S. 544, 559 (1980) to support their view that consent is to be measured against an objective standard. However, Mendenhall involved whether a withdrawal of consent had been communicated. This, like the scope of consent, is an issue distinct from whether the consent was voluntarily given

in the first instance.

Finally, defendants point to Untied States v. Smith, 30 F. 3d 568 (4th Cir.), cert. denied, No. 94-6550, 1994 WL 597381 (U.S., Nov. 28, 1994) as support for an objective test. Smith does not help the defendants' case. In Smith, the Fourth Circuit was confronted by a defendant's claim that his consent, or failure to refuse permission to search, was the nonconsenual product of two previous encounters with police in other jurisdictions in which he had been assaulted. The Court of Appeals rejected Smith's argument because the encounters were temporally unrelated to the search to which he consented. Id. at 571. Nothing in Smith alters the clear statement in Wilson that "the determination of consent to search is subjective." United States v. Wilson, 895 F.2d at 171. [5]

The issue before the court on this motion for summary judgment, therefore, is whether the evidence could permit reasonable jurors to conclude that the entry into Scott's house was made without Scott's voluntarily given consent. The facts that plaintiffs contend are pertinent to this issue, taken as true and allowing all permissible inferences therefrom, are that:

---

[5] It must be noted, however, that Smith does provide significant guidance for the application of the subjective, totality of the circumstances test of coercion. This guidance is that the test is not purely subjective, because an individual's sentiment that he had no choice other than to consent does not constitute coercion if this sentiment is not based upon thecircumstances of the search transaction. This also guides the court's application of the totality of the circumstances test. Smith's prior encounters with the police were not part of the circumstances to be considered. Therefore, the Fourth Circuit limits the "totality of all of the circumstances" to those circumstances that are a part of the search transaction.

(1) Under circumstances indicating some urgency, Scott was instructed by Gooch to abandon preparation of a search warrant and to report to Miller's office.

(2) Scott complied and, about twenty minutes after arriving at Miller's office, met with Miller, Gooch and Hosick. During that meeting Miller inquired whether Scott was aware that a warrant had been issued for the arrest of Amato on trespass charges arising out of the March 22, 1992 incident at Acola's restaurant.

(3) Scott responded that Hosick previously had informed him of the warrant and advised Miller that Amato intended to surrender upon return to Richmond at an unspecified date.

(4) Miller, in "a shrill and menacing tone," then said: "I am ordering you to go to your house and arrest your roommate right now." Scott replied that Amato was out of town and Scott did not possess the power to effect an arrest in Chesterfield County, the location of the residence he and Amato shared.

(5) Pointing his finger at Scott and using a "vociferous and more menacing tone of voice," Miller said: "I am ordering you to go." Hosick was then instructed by Miller to take another officer on the mission and "not [to] let Scott out of your sight until you search."

(6) Scott, Hosick and Mangano (whom Hosick had enlisted to help on the arrest mission) travelled in the same car and, en route, Scott

repeated that Amato was not at the house and "voiced [his] displeasure over being called in from an investigation and ordered by Major Miller and to my place of residence to arrest Amato, who was not even in town."

(7) As Hosick, Mangano and Scott exited the car upon arrival at the residence, Hosick said: "Mike, we've got to look in the house."

(8) Mangano was dispatched to the rear of the house and Hosick and Scott, along with Officer Horowitz from the Chesterfield County who was to serve the warrant, walked from the street to the porch, and, en route, Scott informed Horowitz that he "was 'embarrassed' by the situation, but had been ordered by Miller to participate."

(9) When they arrived at the front door, Horowitz knocked but there was no answer and, according to Scott, " ... under duress, I opened the door." Undisputed evidence shows that there was no conversation after Horowitz knocked and that Scott opened the door with his key.

(10) Scott, Horowitz and Hosick entered the house through the front door. They were jointed later by Mangano who entered through the rear door at the invitation of Hosick. All but Scott looked through the house. Finding that Amato was in fact not there, the others left.

On these facts, he plaintiffs first argue that Scott gave no consent, voluntary or otherwise. (Plaintiff's Joint Mem., p. 35). Their theory is that Scott permitted entry because he

"merely acquiesced to his superior's order that he participate in the search." (Plaintiffs' Joint Mem., pp. 36, 40). The "superior's order" is Hosick's alleged statement: "Mike, we've got to look in the house." (Plaintiffs' Joint Mem., pp. 39-40).

It is unclear what role the plaintiffs ascribe to the comments allegedly made by Miller in his office. On the one hand, the plaintiffs suggest that Miller's comments constituted an order to search issued to Hosick and heard by Scott. (Plaintiffs' Joint Mem., p. 40). On the other hand, the plaintiffs argue that Miller's comments are part of the totality of the circumstances against which the "order" by Hosick is to be evaluated. (Plaintiffs' Joint Mem., p. 40).

Scott's own affidavit clearly established that the order Miller gave to Scott was an order to go to his house and arrest Amato, not to search. (Scott Affidavit, ¶¶ 23, 24). In fact, even after miller allegedly told Hosick "not [to] let Scott out of your sight until you search," (Scott Affidavit, ¶ 25), Scott continued to understand Miller's instructions as "to go to my place of residence to arrest Amato." (Scott Affidavit, ¶ 26) (emphasis added). The plaintiffs offer no other evidence that Miller ordered Hosick to conduct a search. Hence, we need not look beyond Scott's own version of events to conclude that Miller's order was to arrest, not to search.

However, the fact that Miller's alleged statements [6] do not constitute on order to search does not make them irrelevant. Because Miller's remarks were made only shortly before the search and allegedly mentioned a "search," they are part of the totality of the circumstances to be considered

[6] Miller, Gooch and Hosick deny that Miller made any of the remarks attributed to him by Scott.

in assessing whether Scott's consent was coerced. So too is it relevant that: (i) Miller's own affidavit states that he "concluded that Scott should participate in the arrest because it was his house, and he could provide access, if necessary," (Miller Affidavit, ¶ 7); (ii) Scott's protests against participating in the arrest were rebuffed; (iii) Hosick slightly outranked Scott; and (iv) Scott understood Hosick's alleged statement to be a directive rather than a request.

However, for summary judgment purposes, the totality of the circumstances also include those undisputed facts that cut against the plaintiffs' claims. First, Scott's protests against participating in the arrest of Amato were that he was busy with other duties and that the trip was futile because Amato was out of town. It was, of course, within Miller's province, as Scott's superior, to decide how Scott was to use his time while on duty and to reject Scott's assertion that Amato was out of town. Considering Scott's close relationship to Amato and Acola's complaint of favorism, it was neither unreasonable nor nefarious for Miller to have rejected Scott's protestations. In any event, Miller's responses do not establish coercion to permit a search, much less a threat of retribution.

Second, Scott advised Miller that he was without the power of arrest in Chesterfield County. Miller responded to Scott's concern that he lacked authority to arrest in Chesterfield by arranging for the assistance of a Chesterfield County officer who did possess such powers, thereby evincing responsiveness to that concern.

Third, Scott was knowledgeable in the law of search and seizure and knew that a warrantless search without consent was invalid. Likewise, Scott knew that a property owner could decline to give consent and he is charged with knowledge that he could not be disciplined for exercising his constitutional right to refuse entry even if Hosick had ordered

it.[7] It is therefore particularly significant that Scott did not advance a constitutional right as a ground for objection to participation in the arrest of Amato, whatever Scott thought that might entail.

Fourth, the circumstances immediately preceding and following the entry are part of the totality of the circumstances. According to Scott's own account, he made no protest after Hosick, upon exiting the car, gave the purported command - "mike, we've got to look in the house." He raised no objection[8] as the officers walked from the car to the house. When the knock at the door failed to elicit a response, Scott, again with no objection and without suggestion, used his key to open the door. He made no protest during the time the other officers searched the house for Amato or during the return trip to headquarters. While one is not required to protest an unreasonable search to preserve his constitutional rights, the fact that Scott responded to Hosick's statement by opening the house without a protest or further "pressure" is part of the totality of the circumstances in which voluntary consent is measured.

Fifth, shortly after returning to headquarters, Scott

---

[7] There can be little doubt that a police officer cannot be disciplined for asserting his constitutional rights by refusing to consent to the warrantless search of his home. Los Angeles Police Protective League v. Gates, 907 F.2d 879, 886 (9th Cir. 1990) (holding that there can be "little doubt" that it was improper for the police department to discipline an officer for refusing to allow a search of his garage); see also Gardner v. Broderick, 392 U.S. 273, 279 (1968) (holding that it was improper to discharge the police officer for refusing to waive constitutional right against self-incrimination).

[8] Scott states that, as they approached the house, he told Horowitz (the Chesterfield County officer) that he was embarrassed by the participation. That, however, is hardly an objection to participation and it is not the assertion of a right.

complained to his superior, Captain A. Christine Bailor, that he had been victimized by an unlawful search. This, of course, confirms that, at the time of the event, Scott knew the parameters of the law and his rights and that he knew to articulate those rights when he elected to do so.

It is against these total circumstances that Scott's claim of coercion must be measured. The legal predicate for the contention or coercion is a line of authority addressing searches found to be the product of a police command. Specifically, plaintiffs asserts that under Bumper v. North Carolina, 391, U.S. 543 (1968), and its progeny, compliance with a police command is not consent. Those cases, say the plaintiffs, control the outcome of the consent issue here.

In Bumper, four police officers went to the home of a 66 year old woman, and when she met them at the door one officer announced "I have a search warrant to search your house." Id. at 546. The woman responded "go ahead" and opened the door. Id. At a suppression hearing, the prosecutor did not rely on the validity of the warrant, contending instead that the woman had consented to the search.

The Supreme Court held that a search cannot "be justified as lawful on the basis of consent when that 'consent' has been given only after the official conducting the search has asserted that he possesses a warrant." Id. at 548. This was because consent is not proved by showing "no more than acquiescence to a claim of lawful authority." Id. at 549. "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion - all be it colorably lawful coercion. Where there is coercion there cannot be consent." Id. at 550.

The plaintiffs also rely upon United States v. Shepherd, 714 F.2d 316 (4th Cir. 1983), cert. denied, 466

U.S. 938 (1984) which involved the search of the trunk of a car pursuant to a state investigation of illegal liquor production. After observing a suspect transport several one-gallon plastic jugs from the truck of his car to a wooded area, an officer approached the suspect and asked him for the key to the trunk. The suspect complied and the officer opened the trunk to discover 30 one-gallon plastic jugs which were later opened without a warrant and found to contain homemade liquor.

The Fourth Circuit decided the validity of this search under the automobile exception, but in a footnote made the observation that: "there is no evidence that Shepherd's consent was obtained. The officer asked for Shepherd's key, not for permission to search the trunk." Id. at 318, n. 2.[9] Both officers at the scene testified that consent was not obtained. Id. The court further stated:

> Moreover, obeying a polite request issued by someone obviously in authority and capable of enforcing the request does not amount to 'consent' to the request. Citizens may obey police commands even those put in the form of police requests (e.g., "Please raise your hands above your head;" "Please give me your keys") without any derivation from such non-volitional acts of a conclusion that they have waived their constitutional rights.

Id.

Finally, the plaintiffs' take comfort in United States v. Winsor, 846 F.2d 1569 (9th Cir. 1988), wherein the Ninth Circuit considered a search in which the police knocked on

---

[9] This is notably different from the case at bar, in which Hosick referred specifically to looking in the house.

the door, identified themselves as police, and demanded that the occupants open the door. On these facts, the Ninth Circuit held that, as a matter of law, the opening of the door was not consent. Id. at 1573, n. 3.

On the strength of these "police command" cases, plaintiffs argue that, on the totality of the circumstances, a reasonable jury could conclude that "[i]n light of the fact that Scott's prior protest to Maj. Miller had been ignored, Scott reasonably concluded that any further protest to Sgt. Hosick would be meaningless." (Plaintiffs' Joint Mem., p. 40).

These "police command" decisions stand for the principle that a citizen, who is neither informed nor aware of the right to refuse consent, cannot be held to have given consent merely by complying with an instruction or order of a law enforcement official because that compliance is simply an acquiescence to the apparently lawful authority to search. This principle, of course, presupposes that the acquiescing person is not informed of the right to resist a search. Indeed, as explained in Bumper, the presence of an asserted authority to search by a law enforcement official is tantamount to an assertion that "the occupant has no right to resist the search." Bumper, 391 U.S. at 550 (emphasis added).

The totality of the circumstances in this action do not provide the predicate for the application of the "police command" rationale because the circumstances establish beyond question that Scott knew fully of the constitutional right to resist if he so desired. Moreover, the record fails to establish a threat or compulsion of any kind. Although Scott claims now that he feared repercussions if he did not permit entry, there is no evidence to support a reasonable basis for such apprehensions. Allowing entry, with full knowledge of the right not to do so, and absent compulsion, is not within the reach of the "police command' cases on which plaintiffs rely. Thus, Scott's conduct is allowing entry was consent, not

acquiescence to a command within the meaning of Bumper and its progeny.

The question remains then whether the record, construed in plaintiffs' favor permits a reasonable jury to conclude that Scott's consent was coerced. It does not.

The totality of the circumstances establish that, with full knowledge of his rights and without threat or compulsion, Scott opened the house to his fellow officers. Scott's own testimony is that he construed Miller's order to require participation in an arrest. His own testimony shows that he knew how to register protests about illusions on his time and the futility of the mission. Although Scott's protests produced a direction from Miller to do what he was told, his comment respecting the power to arrest met with a reasoned solution. And, at no time did Scott receive a threat.

Finally, Scott's conduct at the house belies coercion. Although he complained to Horowitz about embarrassment after Hosick's statement, he did not exercise his known right to refuse and his actions, taken as a whole, bespoke voluntary conduct. Where, as here, there is no evidence of force or threat, and one knowledgeable of his right to refuse opens his house to entry, a reasonable jury could not conclude that consent to be involuntary.

3. Qualified Immunity

Ordinarily, it is preferable to articulate a single basis for decision and, conversely, to refrain from making alternative holdings. Karsten v. Kaiser Found. Health plan of the Middle Atlantic States, Inc., 36 F.3d 8, 11 (4th Cir. 1994). However, considering that plaintiffs' reliance on the "police command" cases is made under somewhat unusual facts; that the same facts frame the issues respecting the qualified immunity defense; and that the issue of qualified

immunity enjoys a rather unique amenability to appeal, this case presents one of those unusual circumstances where it is appropriate to articulate an alternative ground of decision.

Defendants assert that, even if this record presented a triable issue of fact as to the voluntariness of Scott's consent, they would be protected by the doctrine of qualified immunity to the extent they are sued in their individual capacities. We now consider that question.

The Supreme Court has determined that law enforcement officials are entitled to a qualified immunity from personal civil liability under 42 U.S.C. § 1983 in large measure because of the complex tasks performed by such officials. Taylor v. Farmer, 13 F.3d 117, 120 (4th Cir. 1993). Thus, in Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Supreme Court held that "governmental officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 818.

Applying that principle in determining the existence of qualified immunity to a suit alleging Fourth Amendment violations under 42 U.S.C. § 1983, the Supreme Court, in Anderson v. Creighton, 483 U.S. 635 (1987), held that the immunity from civil liability exists so long as the official's "actions could reasonably have been thought consistent with the rights they are alleged to have violated." Id. at 638. In that regard, the Court explained that:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in the light of

pre-existing law the unlawfulness must be apparent. Id. at 640.

Thus, the doctrine of qualified immunity extends to law enforcement officers a margin of error "when they navigate uncharted areas at the margins of constitutional criminal law." Tarantino v. Baker, 825 F.2d 772, 774 (4th Cir. 1987).[10] This is because " . . . there are two levels on which the immunity shield operates. First, the particular right must be clearly established in the law. Second, the manner in which the right applied to the actions of the official must also be apparent." Maciariello v. Sumner, 973 F.2d 295, 298 (4th Cir. 1992), cert denied, 113 S. Ct. 1048 (1993) Therefore, "[o]fficials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." Id.

The availability of qualified immunity is determined against a standard of objective reasonableness. See Davis v. Sherer, 468 U.S. 183, 191 (1984). As the Fourth Circuit observes in Taylor v. Farmer, "[t]he Supreme Court's decisions place a special emphasis on the reasonableness of an officer's actions, requiring courts to make an objective inquiry into the facts facing the officer at the time of the alleged improper act." Taylor v. Farmer, 13 F.3d at 120.

In that regard, "[t]he existence of qualified immunity 'generally turns on the "objective legal reasonableness" of the actions' [citations omitted] without regard to the knowledge or subjective intent of the particular official." American Civil Liberties Union of Maryland, Inc. v. Wicomico County, 999 F.2d 780, 784 (4th Cir. 1993). Recently, in Rowland v.

---

[10] The Supreme Court's decision in Horton v. California, 496 U.S. 128, 130 (1990) abrogated Tarantino insofar as Tarantino limited the plain view doctrine to inadvertent discoveries. Horton does not affect those parts of Tarantino's holding cited herein.

Perry, Nos. 93-2589, 94-1023, 1994 WL 664353 (4th Cir. Nov. 29, 1994), the Fourth Circuit explicated the nature of the reasonableness inquiry holding that:

> The reasonableness inquiry is an objective one. Id. To gauge objective reasonableness, a court examines only the actions at issue and measures them against what a reasonable police officer would do under the circumstances. Graham, 490 U.S. 386, 397 (1989). Subjective factors involving the officer's motives, intent, or propensities are not relevant. The objective nature of the inquiry is specifically intended to limit examination into an officer's subjective state of mind, and thereby enhance the changes of a speedy disposition of the case. Hunter v. Bryant, 112 S. Ct. 534, 536-37 (1991).
>
> Though it focuses on the objective facts, the immunity inquiry must be filtered through the lens of the of the officer's perceptions at the time of the incident in question. Sevigny v. Dicksey, 846 F.2d 953, 957 (4th Cir. 1988). Such a perspective serves two purposes. First, using the officer's perception of the facts at the time limits second-guessing the reasonableness of actions with the benefit of 20/20 hindsight. Graham, 490 U.S. at 396. Second, using this perspective limits the need for decision-makers to sort through conflicting versions of the "actual" facts, and allows them to focus instead on what the police officer reasonably perceived. Gooden v. Howard County, Md., 954 F.2d 960, 965 (4th Cir. 1992) (en banc). In sum, the officer's subjective state of mind is not relevant to the qualified immunity inquiry but his perceptions of the objective facts of the incident in question are.

Id. at *3.

On a motion for summary judgment, the court may determine whether the law was clearly established at the time an action occurred. Harlow, 457 U.S. at 818. Therefore, if the defendant's entitlement of immunity turns on a factual dispute that dispute is resolved by the jury at trial. However, if, assuming the facts alleged by the non-moving party to be trust, it is still not clear that the official action violated plaintiffs' rights, summary judgment is appropriate. See Anderson, 483 U.S. at 641. "[T]he burden of establishing that critical issue that the right violated was clearly established under the stated standard appears to rest on the plaintiff suing the public officer." Clark v. Link, 855 F.2d 156, 160-61 (4th Cir. 1988). See also Davis V. Scherer, 468 U.S. 183, 197 (1984).

Applying these principles to the facts in this record, the defendants are entitled to qualify immunity for the alleged violation of Scott's and Amato's Fourth Amendment rights to be free from unreasonable searches even if there were a genuine dispute of material fact respecting whether Scott's consent was voluntary. The record establishes that Hosick made the statement "Mike, we've got to look in the house." In response to this statement, and experienced police officer knowledgeable of the law of search and seizure walked to his door, inserted his key into the door, and allowed fellow officers to enter. At no time did Scott articulate objection to entering his house. According to the record, Scott made do negative response after Hosick allegedly said that it would be necessary to look in the house. Without protest, he accompanied Hosick and Horowitz on the walk from the car to the front door where Horowitz knocked on the door. When there was no answer, Scott, without any prompting from anyone, removed the key from his pocket and used it to open the front door of this house. He neither complained about the opening of the door nor objected to the subsequent entry by Hosick and the others nor in any way suggested that is was objectionable to him.

This conduct must be viewed, as Hosick and Mangano would have viewed it, in stark contrast to Scott's complaints about being ordered to arrest his roommate which he claims vociferously to have made in Hosick's presence en route to the house. Clearly, a reasonably objective officer could have believed that another officer who knew how to voice objections to directions of a superior, but who instead opened the door without objection, was voluntarily consenting to the search.[11]

Based on these facts and viewed from the perspective of the actors, the search of the house "could reasonably have been thought consistent with the rights [the officers] are alleged to have violated." Anderson, 483 U.S. at 638. This result is not altered by the plaintiffs' assertion that "the law of consensual searches is clearly established by Bumper and subsequent cases." (Plaintiffs' Joint Mem., p. 44). To the contrary, plaintiffs have cited, and the court has bound, no authority applying the "police command" line of authority to a fact pattern which remotely resembles this case. Thus, even if that authority were ultimately determined to control these facts, it could not be said that the violation was apparent in the light of the pre-existing law at the time of the search. Certainly it could not be said that a reasonable officer must have understood that what he was doing violated plaintiffs' rights. Therefore, under Harlow's objective reasonableness standard, the defendants are protected by qualified immunity.

Nor can plaintiffs prevail by making the general argument that it is "clearly established that police may not coerce consent from a homeowner," (Plaintiffs' Joint Mem., p. 42), or that the law if "quite clear as to the factors that

---

[11] While the failure to protest alone is insufficient to constitute voluntary consent, it is directly relevant to the issue of whether a reasonable officer would have concluded that Scott was voluntarily consenting to the search.

determine voluntary consent." (Plaintiffs' Joint Mem., p. 44). In Anderson, the Supreme Court expressly recognized that the operation of the "clearly established" standard "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." Anderson, 483 U.S. at 639. The Court noted that allowing an overly general characterization of the legal rule would allow plaintiffs "to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." Id. Therefore, it is not sufficient that the prohibition of coerced consent is clearly established in the law. To overcome qualified immunity, the law must be sufficiently clear that a reasonable officer would have known that his actions violated the law. Id. at 640. For the reasons previously stated, that simply is not the case here.

Finally, plaintiffs contend that the violation of their constitutional rights was motivated by ill-will and the defendants' ulterior motive and that such actions are not protected by qualified immunity. This argument must be rejected in light of the Fourth Circuit's most recent admonition that "[s]ubjective factors involving the officer's motives, intent, or propensities are not relevant" to the determination of qualified immunity. Rowland v. Perry, Nos. 93-2589, 94-1023, 1994 WL 664353, *3 (4th Cir. Nov. 29, 1994).

In Harlow V. Fitzgerald, 457 U.S. 800 (1982), the Supreme Court expressly departed from its previous holdings that qualified or "good faith" immunity had both an objective and subjective aspect when applied to summary judgment motions on federal claims. See Burnham v. West, 681 F. Supp. 1169, 1173, n. 8 (E.D. Va. 1988). Before Harlow, the subjective aspect of qualified immunity resulted in many meritless claims proceeding to trial because an official's subjective good faith or malicious intent had been considered

a question of fact for the jury to resolve. For that reason, the Court in Harlow required a showing that the allegedly offending conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818.

In the wake of Harlow, there arose differences among the circuits whether Harlow had eliminated the subjective element of qualified immunity. In two decisions shortly following Harlow, the Fourth Circuit held that:

> although the Harlow Court indicated that the good-faith defense turns primarily on objective factors . . . it did not hold that an exclusively objective standard was to be applied to claims that proceed to trial. Thus, the County's argument that the standard for good faith immunity must be purely objective is untenable.

McElveen v. County of Prince William, 725 F.2d 954, 957-58 (4th Cir.), cert. denied, 469 U.S. 819 (1984); see also Vizbaras v. Prieber, 761 F.2d 1013, 1016 (4th Cir. 1985), cert. denied, 474 U.S. 1101 (1986) (citing above language of McElveen).

Any uncertainty about the extent to which Harlow requires that qualified immunity turn on objective factors has been largely resolved by recent decisions of the Supreme Court and the Fourth Circuit. The Supreme Court's decision in Anderson v. Creighton, 483 U.S. 635 (1987) also seems to vitiate McElveen and Vizbaras to the extent they suggest that the officers' subjective intent or malice may be relevant. In Anderson, the Supreme Court held that consideration of the information possessed by the government official whose conduct was challenged "does not reintroduce into qualified immunity analysis the inquiry into officials' subjective intent

that Harlow sought to minimize." Anderson, 483 U.S. at 641 (emphasis added). The decision in Anderson continues to make clear that the relevant question "is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed. Anderson's subjective beliefs about the search are irrelevant." Id.

The Fourth Circuit's decision in Rowland v. Perry, Nos. 93-2589, 94-1023, 1994 WL 664353 (4th Cir. Nov. 29, 1994) takes the same position on objective reasonableness. The Fourth Circuit held that "the officer's subjective state of mind is not relevant to the qualified immunity inquiry but his perceptions of the objective facts of the incident in question are." Id. at *3.

Although Anderson and Rowland permit consideration of the facts as perceived by the officer, they preclude consideration of what McElveen and Vizbaras seem to allow, an inquiry into the official's subjective belief as to the legality of his actions. Vizbaras, 761 F.2d at 1015-16. For the foregoing reasons, the defendants are entitled to qualified immunity from the claims that they violated the rights of Scott and Amato under the Fourth Amendment's unreasonable search clause.[12]

II

---

[12] The claims against Miller and Gooch are predicated upon their own conduct and their conduct as supervisors of Hosick and Mangano. There is no evidence to support the notion that Miler and Hosick were liable by virtue of what they did, or did not, do. Thus, where, as here the record discloses no basis to hold Miller and Gooch liable for their own actions, summary judgment in favor of Hosick and Mangano inures to the benefit of Miller and Gooch as well.

The Search and Seizure State Claims

Scott and Amato challenged the same search as violation of Va. Code § 19.2-59 which provides that "[n]o officer of the law or any other person shall search any place, thing, or person, except by virtue of and under a warrant issued by a proper officer." Va. Code § 19.2-59. The Virginia statute consistently has been held to provide the same protection as the Fourth Amendment of the Constitution of the United States. Carter v. Commonwealth, 163 S.E. 2d 589 (Va. 1968), cert. denied, 394 U. S. 991 (1969); Burnham v. West, 681 F. Supp. 1169 (E.D. Va. 1988).

The immunity defense applicable to this Virginia statute is denominated "sovereign immunity" rather than qualified immunity. Sovereign immunity protects government officials from personal liability for "acts of simple negligence." Burnham 681 F. Supp at 1173. However, because Va. Code § 19.2-59 provides only the same protection as the Fourth Amendment, "[o]nly the constitutional standard of conduct, therefore, should apply for purposes of determining sovereign immunity in actions brought under Section 19.2-59." Id.

The facts alleged to give rise to this state claim are exactly the same as those discussed with respect to Fourth Amendment search claims. The court already has concluded that the defendants' conduct neither violated the Fourth Amendment nor exceed the boundaries of qualified immunity. Hence, Miller, Gooch, Hosick and Mangano are entitled to summary judgment on the state law claims under Va. Code § 19.2-59.

III

Amato's Unlawful Arrest Claim

The thrust of Count II of Amato's complaint, as originally cast, was an alleged violation of due process under the Fourteenth Amendment for the maliciously motivated arrest of Amato on charges of trespass and extortion. However, both parties agree that, under Albright v. Oliver, 114 S. Ct. 807 (1994), the Fourteenth Amendment's protection of substantive due process does not afford a remedy for prosecution without probable case. See Wilkes v. Young, 28, F.3d 1362, 1364, n. 2 (4th Cir. 1994) (following Albright's holding that an individual alleging prosecution without probable cause for no Fourteenth Amendment claim). In response to Albright, Amato has abandoned his argument that the institution of charges against him violated the Fourteenth Amendment. (Plaintiff's Joint Mem., p. 49). Instead, by virtue of general allegations incorporated by reference in Count II, Amato claims that his Forth Amendment rights to freedom from unreasonable seizure were violated by his surrender to arrest on charges of trespass and extortion. See Wilkes, 28 F.3d at 1364, n. 2 (stating that claim for arrest without probable cause can only be judged under Fourth Amendment).

As a threshold matter, the defendants argue that summary judgment is appropriate on Count II because due process is the only constitutional deprivation asserted by Amato. The defendants advance the related argument that assertions of a Fourth Amendment claim now would require amendment of the complaint which should not be permitted at this point in the proceedings because it would work hardship on defendants. (Defendant's Reply Mem., p. 23). The argument misapprehends the content of Amato's complaint. Count II expressly incorporates by reference paragraphs one through fifty-seven of the Second Amended Complaint. In paragraph 12, Amato asserts that defendants have deprived him of his constitutional rights under the Fourth, Fifth, and Fourteenth Amendments, and that these deprivations have included his right to protection from

unreasonable searches and seizures and unlawful arrest. The text of the Second Amended Complaint is sufficient to advance a Fourth Amendment claim for unlawful arrest, notwithstanding that the emphasis of Count II was originally a Fourteenth Amendment claim founded on language suggesting malicious prosecution. Further, discovery has encompassed the arrest issues. Hence, there is no hardship on defendants in defending such a claim and they certainly have not demonstrated prejudice.

In Albright, the Supreme Court observed that : "[t] he Framers considered the matter of pretrial deprivations of liberty, and drafted the Fourth Amendment to address it." Albright, 114 S Ct. at 813. The Court also explained that "[w]e have in the past noted the Fourth Amendment's relevance to the deprivations of liberty that go hand in hand with criminal prosecutions." Id. The Fourth Circuit has recognized that wrongful arrest can form the basis for an action under 42 U.S.C. § 1983. Goodwin v. Metts, 885 F.2d 157, 160 (4th Cir. 1989), cert. denied, 494 U.S. 1081 (1990).

The claim in Court II hinges on whether Amato was seized in violation of the Fourth Amendment when, on August 6, 1992, he voluntarily surrendered to arrest pursuant to the trespass and extortion warrants. Submission to arrest certainly constitutes a seizure for purposes of the Fourth Amendment. See Albright, 114 S. Ct. at 812; Id. at 814 (Ginsburg concur.) ("Albright's submission to arrest unquestionably constituted a seizure for purposes of the Fourth Amendment").

Amato submitted to arrest on both the trespass and extortion charges. The issues presented by Count II are whether this seizure was unreasonable under the Fourth Amendment, See DeLoach v. Bevers, 922 F.2d 618, 621-22 (10th Vir. 1990), cert. denied, 112 S. Ct. 6 (1991); United States v. McEachern, 675 F.2d 674 (4th Cir. 1982), and

whether the challenged conduct was protected by qualified immunity. See Malley v. Briggs, 475 U.S. 335, 334-45 (1986); Torchinsky v. Siwinski, 942 F. 2d 257, 261 (4th Cir. 1991).

Amato's unlawful seizure claim then falls within the rubric of law controlling arrest by warrant. Generally, when a police officer obtains a warrant in good faith and acts within its scope, he is not liable if the arrest is not founded on probable cause. Olson v. Tyler, 771, F.2d 277, 281 (7th Cir. 1985). This is because the magistrate's decision operates as a shield to liability for unlawful arrest. We are here concerned with an exception to this general rule and the barrier to liability when it provides. The exception was explained by the Seventh Circuit in Olson v. Tyler:

> If an officer submitted an affidavit that contained statements he knew to be false or would have known were false had he not recklessly disregarded the trust [citations omitted] and no accurate information sufficient to constitute probable cause attended the false statements, not only is his conduct the active cause of the illegal arrest, but he cannot be said to have acted in an objectively reasonable manner.

Olson v. Tyler, 771 F.2d at 281. The same result obtains if the officer intentionally withheld information that would reveal a lack of probable cause. DeLoach v. Bevers, 922 F.2d at 622; Isidore Silver, Police Civil Liability § 4.02 (one who knowingly discloses false, incomplete, or misleading information may be liable unless the arrest was not based on that data). Of course, the untruthful statement or omission must be necessary to a finding of probable cause because otherwise there is no casual nexus to the unlawful arrest. Wilkes v. Young, 28 F. 3d 1362, 1365 (4th Cir. 1994).

To succeed on a section 1983 claim, Amato must

prove not only that false or misleading statements were made or that there was a material omission, but also that there was a causal nexus between the statements or omission and a constitutional violation. This casual nexus can exist even where a magistrate issues a warrant or prosecutor makes the ultimate decision to charge or to proceed to trial, or where a grand jury decides to indict, if the defendant police officer "deliberately supplied misleading information that influenced the decision." Goodwin v. Metts, 885 F. 2d 157, 162 (4th Cir. 1989), cert. denied, 856 F. 2d 985, 993 (7th Cir. 1988)).

Amato weaves a complicated and expansive web of facts in order to support each claim. Therefore, the facts pertinent to each wrongful arrest argument will be addressed separately. These facts are relevant, however, only to the extent that the challenged conduct was necessary to the findings of probable cause on which Amato was arrested.

A. Amato's Arrest On The Trespass Charge

Miller, Gooch and Hosick are charged in Count II with wrongfully and maliciously procuring Amato's arrest on a trespass charge arising out of the Forced Entry Incident on March 22, 1992 by Amato and Scott's lawyer, Benson. Taken in the light most favorable to Amato, the record establishes the following respecting the incident and the warrant for his arrest.

As explained previously, Scott had an interest in the premises leased to Acola and operated as Acola's Restaurant. Scott, acting through Benson, had instituted proceedings in state court to evict Acola from the restaurant and to collect delinquent rent. The state court, however, had continued the proceedings until May 1992, thereby creating the possibility that Acola could retain possession under lease by bringing the rent current. Scott became concerned about property destruction at the leased premises and, at Scott's request,

Benson and Amato visited the premises on March 22, 1992 with Richmond Police Officer Timothy Arthur, who had been dispatched to the premises at Benson's request.[13]

Hosick's investigation notes, recorded contemporaneously with his investigation, reflect the history of the investigation. They show that Amato reported to Officer Arthur Scott's concern that Acola was removing fixtures from the restaurant. Benson and Amato presented Arthur with a copy of a lease and certain other papers related to Acola's business. Those documents and the conversations with Amato and Benson led Arthur to the impression that Amato and Scott were in the process of obtaining an eviction notice but had not yet secured one. That, of course, was correct because the eviction proceedings were pending in state court.

At the time of the Forced Entry Incident, Amato observes a light on the upper flow of the premises and commented that he thought Acola was upstairs. According to Officer Arthur, Amato tried to open the door with the key and concluded that the locks had been changed. Amato is reported to have said "I'll just break the door in. I'll bet he's up there." Thereupon, Amato, against the advice of Officer Arthur, broke the door in, ran upstairs and reported that no one was present. Using wood found on the premises, Amato secured the broken door and all three men left.

On March 31, 1992, Gooch, acting at Miller's direction, directed Hosick to assume control over the investigation. In the ensuing days, Hosick conducted the investigation which uncovered the facts outlined above during

---

[13] As mentioned previously, Amato was at the time using the alias of Dan Salerno and some of the reports respecting the incident use that name rather than Amato.

interviews with Officer Arthur and Benson.

On April 2, 1992, Hosick interviewed Acola's lawyer who reported that someone by the name "Salerno," who lived with Scott, and who, during a court hearing, claimed to have been speaking for Scott, had acted aggressively and forcefully towards Acola. The lawyer also reported that Salerno had made threats to the effect that "he was going to get my client" and then recounted the January Lock Changing Incident. Acola's lawyer informed Hosick that "Salerno was trying to force his client out of the business because he heard that there may be a sale pending on the property."

Later the same day, Hosick interviewed Acola who reported that the eviction hearings had been delayed until May because he was making progress payments; explained the January Lock Changing Incident; and stated that matters had gotten out of had when Salerno begin "intimidating him out of business."

On April 6, 1992, Hosick learned from Arthur that Magistrate Thomas and Arthur has advised Acola and Acola's attorney that the Forced Entry Incident on of March 22 was considered by them to be a civil matter and therefore that "no warrant was going to be obtained due to the lack of probable cause." The incident report prepared by Hosick on April 7, 1992, reflects the following notation:

> Because of the facts revealed in this investigation, I recommend the report be carried as "UNFOUNDED."

Having completed his investigation Hosick sought audience with Joseph Morrissey, the Commonwealth's Attorney for the City of Richmond who, on April 7, 1992, according to Hosick's report " . . . was not impressed that the offense occurred in the presence of a police officer. He stated that he would not prosecute the case as there is no

probable cause to believe that Salerno [Amato] had intent to commit a felony in the presence of the police. He advised against obtaining any warrant for this case."

On April 9, 1992, Hosick advised Scott, Benson and Acola of the results of the investigation, including the lack of interest on the part of the Commonwealth's Attorney in prosecuting Amato. According to Hosick's notes, Acola telephoned Hosick later in the day and reported having spoken with the Commonwealth's Attorney who, according to Acola, had informed Acola that if Hosick wanted a warrant, Morrissey would give it to him.

Rightfully concerned about the discrepancy between Acola's report and his own previous discussion with the Commonwealth's Attorney, Hosick communicated with Morrissey on April 10, 1992. Morrissey advised that he had informed Acola that the police determined who was to be arrested and that the Commonwealth's Attorney merely handled prosecutions. Hosick's notes reflect that Morrissey said: ". . . he [Morrissey] still feels there's no irresponsible equivocation in advising Hosick that there was no probable cause while, at the same time, informing the complaining citizen, Acola, that the matter was in police hands, Hosick sought out the City's Chief Magistrate, William Shannon. According to Hosick, Chief Magistrate Shannon refused to issue a warrant for the burglary and larceny claims being advanced by Acola, but advised Hosick that he would consider "issuing a warrant for trespass to Acola for Salerno [Amato] if there was probable cause including an occasion where Acola advised Salerno [Amato] to keep away and out of his business."

Later that day, Acola telephoned Hosick who passed along to Acola the magistrate's observation that " . . . that he may obtain a trespass warrant for Salerno [Amato] if he [Acola] had told him [Amato] on a previous occasion keep

away." Acola and Hosick met at police headquarters and Hosick introduced Acola to Magistrate Shannon. Hosick did not participate in the conference between Acola and Magistrate Shannon. Acola signed a complaint upon which the magistrate issued a warrant for the arrest for Daniel A. Salerno on a charge of trespass. The complaint recites the following as the basis for the magistrate's belief that there was probable cause:

> January of 1992 Salerno was told not to come back on said premises after a similar incident occurred. He came back on March 22 and kicked in the back door taking personal possessions.

Thus, the undisputed record shows that Acola, not Hosick, procured the trespass warrant. It also appears to be undisputed that on a previous occasion, Acola had attempted unsuccessfully to obtain a warrant.

Further, the record reflects that on October 11, 1994, in connection with this litigation, another Magistrate, A. Christine Browning, by affidavit reported remembering an incident which occurred "approximately two and a half years ago" in which she recalls that Hosick requested her to issue an arrest warrant on a charge of trespass against Amato. Magistrate Browning is unable to recall the exact date of the conversation and her affidavit appears to be largely the product of recollection refreshed as a consequence of newspaper articles about this litigation in 1994. Magistrate Browning reports that another Magistrate witnessed the discussion, but the record contains no information from the witness. Hosick has no recollection of the conversation except that he had some general discussion with Browning about the matter.

On the basis of these facts Amato predicates his claim of unreasonable seizure, which he articulates as follows:

> He [Hosick] himself knew that there was no probable cause for the warrant. However, he 'magistrate shopped' the case until he found one that would issue the warrant. He deliberately withheld key information to the Magistrate, lading the Magistrate to tell him that a warrant would issue if Acola would say that he had previously told Amato to stay away. He told before the Magistrate, knowing that it was the first time Acola mentioned that he had told Amato to stay away.

(Response Mem., p. 50)

Taking, as true, all of the facts on which Amato relies and giving Amato the benefit of all positive inferences. the court concludes that Hosick is not liable for seizure of Amato in violation of the Fourth Amendment. Where, as here, the arrest is pursuant to a warrant, there is no Fourth Amendment claim unless the officer provided to the person or body charged with determining probable cause information that he knew to be false of would have known to be false had he not recklessly disregarded the trust of the statement. Olson v. Tyler, 771 F. 2d 277, 281 (7th Cir. 1985), or that he omitted information so probative as to initiate probable cause. DeLoach v. Bevers, 922 F. 2d 618, 622 (10th Cir. 1990), cert. denied, 112 S. Ct. 65 (1991). There is no evidence whatsoever that Hosick supplied false information to Magistrate Shannon. Conceding this, as he must, Amato argues that Hosick omitted material information by failing to inform Magistrate Shannon that the lease held by Acola permitted the landlord to enter or that, in the original interview, Acola had reported having directed Amato not to return to the property. The information omitted is not necessary to a probable cause determination, not is it so probative that it would initiate probable cause if disclosed. The lease issue was pending state court dispute which neither Hosick nor the magistrate was at liberty to resolve in

assessing probable cause to trespass and hence it was a neutral favor. The very nature of Magistrate Shannon's statement that he would consider issuing a warrant if Acola had previously ordered Amato to stay away demonstrates that the magistrate knew that Acola had not clearly made such an assertion on previous interviews. Otherwise, there would have been no need for the magistrate to have raised the subject.

Amato correctly observes that Hosick is responsible for the natural consequences of his actions and that a police officer cannot hide behind the decisions, or the conduct, of others if he has "deliberately supplied misleading information that influenced the decision." Goodwin v. Metts, 885 F.2d 157, 162 (4th Cir. 1989), cert. denied, 494 U.S. 1081 (1990) (citing Jones v. City of Chicago, 856 F. 2d at 621-22 (10th Cir. 1990). However, the evidence in this record does not constitute the deliberate supplying of misleading information. At most, Hosick neglected to provide information which might or might not have affected the decision to issue the warrant during an informal conversation with a magistrate who declined to issue the warrant Hosick had requested.

Indeed, it was Acola's conduct, not Hosick's, which produced the trespass charge. There is no evidence that Acola was acting at Hosick's behest. Acola tried unsuccessfully to secure a warrant without any involvement from Hosick. Acola continued to press the matter with the Commonwealth's Attorney and with Hosick. The prime actor here was Acola. That is not changed merely because Hosick reported to Acola the magistrate's observation about what would prompt him to issue a warrant for trespass. Hosick's role and conduct concerning the issuance of the warrant is insufficient to create liability in this case.

A citizen has the right to swear out a warrant, which is what Acola chose to do in this case. The magistrate found

that the information provided supporting finding of probable cause for the misdemeanor of trespass. The information presented by Acola to Magistrate Shannon is sufficient to provide probable cause for a trespass warrant. The information possessed by Hosick would not have altered that determination. Because nothing that Hosick did, or did not do, was necessary to this conclusion, liability does not exist under section 1983.

B. Qualified Immunity Concerning Trespass Charge

Even if the facts could be construed to present a triable issue respecting liability for the trespass warrant, summary judgment would still be appropriate as to all officers individually, under the qualified immunity doctrine. The court must grant summary judgment if, in light of clearly established principles of law, the officer could, as a matter of law, reasonably have believed that his conduce was lawful. Anderson v. Creighton, 483 U.S. 635, 641 (1987). The Supreme Court has specifically addressed the application of qualified immunity to wrongful arrest cases. In Malley v. Briggs, 475 U.S. 335 (1986), the Court held:

> [T]he same standard of objective reasonableness that we applied in the context of a suppression hearing in Leon, supra, defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest. Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable . . . will the shield of immunity be lost.

Id. at 344-345. Further explaining the application of the objective reasonableness standard to cases involving arrests, the Court held "[d]efendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but

if officers of reasonable competence could disagree on this issue, immunity should be recognized." Id. at 341. The Fourth Circuit has followed Malley's formulation and application of the qualified immunity doctrine. Torchinsky v. Siwinski, 942 F. 2d 257 (4th Cir. 1991). An officer's subjective motives and beliefs play no role in this assessment. Rowland v. Perry, Nos. 93-2589, 94-1023, 1994 UL 664353, *3 (4th Cir. Nov. 29, 1994).

Based on the evidence, the court concludes that officers of reasonable competence possessing the information reasonably available to Hosick could have concluded that there was probable cause for a trespass warrant. Because Amato, acting against the advice of a police officer, broke down a door to the building at night, following an earlier confrontation with Acola in which the police had been involved, and at a time that the disputed status of Acola's lease was pending legal resolution, a reasonable officer could have concluded that probable cause existed for a trespass warrant if, as Acola told the magistrate, he had told Amato in January of 1992 to stay off the premises. The fact that Hosick had recommended that Hosick's complaint be carried as "unfounded" does not mean that, looking at the facts from his perspective at the time, it clearly violated Amato's rights to discuss the matter with the Chief Magistrate or to inform Acola of the Chief Magistrate's position.

Qualified immunity is also appropriate because it is not clearly established how the law would apply to Hosick's conduct. He spoke with the Chief Magistrate after another magistrate had denied Acola a warrant. He provided some facts but not every fact that Amato now argues is relevant. When the Chief Magistrate indicated that he would consider issuing a warrant, Hosick did not request that one be issued. Rather, he accurately reported Chief Magistrate Shannon's position to Acola. When Acola decided to swear out a warrant, Hosick introduced him to the Chief Magistrate. The

law is not at all clear that this course of conduct, by an officer mindful of accusations of favoritism by the police force, violates constitutional law. Hosick's decisions in this grey area are protected by the qualified immunity doctrine.

Amato has cited no authority explaining what clearly established law this conduct violated. In fact, his argument seems to reduce itself to the theory that Hosick continued to press the matter because of ulterior motives.

The qualified immunity analysis intentionally focuses on the objective reasonableness of Hosick's actions. Because immunity does not turn on the subjective intent of Hosick or any other defendant, the myriad of allegations about a grand scheme to "get" Amato is irrelevant. Nor is evidence of some ulterior motive for arresting Amato relevant to the determination of qualified immunity. Because Hosick's challenged conduct was objectively reasonable, he and anyone else liable for his conduce would be protected by qualified immunity.[14]

C. Amato's Arrest On Extortion Charges

Amato makes the same Fourth Amendment wrongful arrest argument as to his arrest on the extortion indictment that he made as to the trespass. The law governing this claim is the same as the law governing the trespass claim. Because the facts and officials involved are different, it is necessary briefly to present the facts pertinent to this claim.

On April, 22, 1992, at approximately 3:15 a.m., Acola's Restaurant was destroyed by fire set by an arsonist.

---

[14] This, of course, would include Miller and Gooch whom Amato seeks to hold liable for Hosick's conduct. There is no evidence that Miller and Gooch were involved in this episode other than receiving from Hosick.

Investigation of the fire was assigned to Shuman as the officer on duty when the fire occurred. In the courses of investigating the fire and its possible causes, Shuman ware of the dispute between Acola and Amato. Based upon this information, Shuman communicated to William J. Parcell, Assistant Commonwealth's Attorney, his belief that Amato has threatened Acola. Parcell decided to present extortion charges against Parcell to a grand jury which indicted Amato on July 1, 1992, based principally on testimony given by Shuman. Amato surrendered to this charge and the trespass warrant on August 6, 1992.

Amato argues that his arrest "resulted from actions of Det. Shuman on the extortion charge." Response Mem., p. 51. Amato alleges that "Det. Shuman deliberately lied to both the prosecutor and the grand jury and withheld relevant information." Id. This claim is based upon three alleged omissions and one alleged lie. Id. at 30.

The three facts allegedly omitted were that : (1) five months has passed between the Lock Changing Incident and the time that Acola first said that he was threatened by Amato; (2) the alleged threat involved a beating with a five point salami (so as to avoid leaving marks on the body of the victim); and (3) Acola told Overstreet at the time of the Lock Changing Incident that he was satisfied, or had not been threatened. Id. at 30, n. 142. The alleged lie was Shuman's representation that Bilter had reported seeing "fear" in Acola's eyes during the lock-changing incident. Id. at 30.

The evidence presented by Amato is insufficient to support a finding of liability based upon Amato's surrender on extortion charges. As to the three omissions, Amato presents nothing beyond conjecture that they were the result even of negligence on Shuman's part, let alone knowing or reckless disregard for the trust. The allegedly omitted information would not have precluded a finding of probable

cause in the first instance. Nor does omission of the information permit a finding that Shuman knowingly or recklessly misled the grand jury. Amato would have the fact finder infer the required intent through speculation, based upon allegations and insinuations that Shuman and others were out to "get Scott and Amato") and that they had some alterative, devious agenda to extract information about a supposed federal investigation.[15] However, the evidence is insufficient to prove that Shuman knowingly or recklessly cited to mislead the grand jury.

Nor does the evidence support Amato's claim that Shuman intentionally misrepresented Bilter's statement to the grand jury. To prove that Shuman lied, Amato relies on Bilter's testimony that his statement to Shuman was that Acola was angry, not that he saw fear in Acola's eyes. On summary judgment motion, we must take as true that Bilter did not in fact claim to have seen fear in Acola's eyes. However, Amato must prove that Shuman knowingly or recklessly disregarded the accuracy of his representation of Bilter's comment. The record does not support this essential element of liability.

The pertinent portion of the record concerns Bilter's testimony at a hearing on Acola's motion for expungement of the arrests from his record. Bilter testified there that he did not see fear in Acola's eyes, but rather that Acola was mad.

---

[15] The record reflects that in 1994, after this action was instituted, Shuman reportedly said that he was going to "get" Amato, that Amato and Scott were "dirty," and Scott as a "no good lousy criminal," that Amato and Scott were "scumbags" and that they were working for the F.B.I. If these statements were made, they are two far removed from the incidents in question to be probative of any animus at the time of the incidents involved in this action. The record contains no evidence to support the charge that Shuman was motivated by ill-will in the period April 22 to July 1, 1992.

Bilter Dep., p. 78. According to Bilter, he and Shuman went up for a cup of coffee after the court hearing, at which time Shuman said "You told me that you seen [sic] fear in his eyes." (Bilter Dep., p. 78).

While Bilter insists that Shuman "had to understand what I said, " (Bilter Dep., p. 80) Bilter's account of this conversation shows that Shuman stood by his recollection of what Bilter had said, even in a private conversation with the man who made the statement in the first place. Not only does this not support Amato's contention of a deliberate lie, it is strong evidence that Shuman remembered the comment as he represented it to the prosecutor and the Grand Jury.

The second element of official liability for a Fourth Amendment deprivation is a causal nexus between the official action and the arrest. Amato must prove that the alleged omissions and lie were "necessary to the finding of probable cause." Wilkes v. Young, 28 F.3d 1362, 1365 (4th Cir. 1994) (citing Franks v. Delaware, 438 U.S. 154, 156 (1978)). This casual connection is absent as to the omitted information. These omissions are not of such a nature that, had complete information been provided, the grand jury could have not found probable cause. It is not enough that the omitted evidence if favorable to Amato, especially given the fact that a suspect has no right to have exculpatory information presented to the grand jury. United States v. Williams, 112 S. Ct. 1735, 1744 (1992).

The causal nexus is also lacking as to Shuman's alleged lie. Amato contends that "the critical piece of evidence suggesting that an indictment was warranted was a statement Shuman attributed to Fred Bilter -- that Bilter saw 'fear' in Acola's eyes." (Plaintiffs' Joint Mem., pp. 29-30). This assertion, which is based upon the deposition testimony of Parcell, is flawed in two respects.

First, Parcell did not testify that it was the particular comment about "fear" that was significant in the decision to prosecute. Rather, it was the more general fact that Bilter was present during the incident at issue and could corroborate Acola's version of the events that took place. (Parcell Dep., pp. 92-94).

Second, even if Shuman's representation of Bilter's comment did affect Parcell's decision to bring the charge before the grand jury, that does not make it necessary to the finding of probable cause. The fact that Acola was claiming that he had been threatened by Amato was, itself, sufficient to support a finding of probable cause. Parcell testified that Shuman's representation of Bilter's comment corroborated Acola's version of events made and the case strong enough to handle directly through a grand jury indictment rather than through an arrest warrant. (Parcell Dep., pp. 92-93). But Parcell also clearly explains that, had Bilter not witnessed the incident at all, his advice would have been to "arrest the guy on a warrant." (Parcell Dep., pp. 92-93). The evidence establishes that Shuman's representation of Bilter's statement influenced the procedure by which Amato's arrest was pursued, not that is was necessary to the finding of probable cause.[16]

---

[16] Parcell dies recognize that it is the weaker cases that are handled through arrest warrants and that the purpose in so doing is to add an additional screening process. It is therefore reasonable to infer from Parcell's statement that absent Bilter's corroborations the chances of obtaining a warrant would be reduced.

On this record, there is not sufficient evidence for the jury to return a verdict against any defendant in Amato's favor on this claim. Therefore, summary judgment is appropriate.

On this record, there is not sufficient evidence for the jury to return a verdict against any defendant in Amato's favor on this claim. Therefore, summary judgment is appropriate.

D. Qualified Immunity Concerning Extortion Charge

Even if there were a triable issue of fact as to official liability for the arrest on the extortion charge, the court would hold that the officers are protected from personal liability by qualified immunity. The defendants would lose the protection of qualified immunity if it is objectively obvious that no reasonably competent officer could have believed probable cause to exist. Malley v. Briggs, 475 U.S. 335, 341 (1986). Notwithstanding the allegations made against Shuman and all other defendants, the court is confident that a reasonably competent officer could have concluded that probable cause existed to charge Amato with extortion. Both Acola and his attorney had informed the police that Amato had threatened Acola. Amato had later forced entry into Acola's restaurant. Based on this information alone, a reasonably competent officer could have believed there to be probable cause to support extortion charges against Amato.

Where the conduct of a government official is objectively reasonable, Harlow and its progeny generally require that qualified immunity be recognized to avoid excessive disruption of government and to permit the summary resolution of insubstantial claims. The court concludes that Amato's claim as to the extortion charge is insubstantial and should not go forward. This result is the same both on merits and under the qualified immunity doctrine.

IV

Intentional Infliction of Emotional Distress

In Counts III and IV of their respective complaints, Scott and Amato asserts state tort claims for the alleged intentional infliction of emotional distress. They are predicated on the supplemental jurisdiction conferred on this court by 28 U.S.C. § 1367. The court declines to exercise jurisdiction over those claims because all claims over which the court has federal question jurisdiction have been dismissed on summary judgment motion. 28 U.S.C. § 1367 (c)(3).

V.

The Official-Capacity Claims

Miller, Gooch, Hosick, Mangano and Shuman are sued personally and officially in each count asserted by Scott and Amato. When a defendant is named in his official capacity, the suit, in reality, is against the municipality. Kentucky v. Graham, 473 U.S. 159 (1985); Martin A. Schwartz and John E. Kirklin, Section 1983 Litigation: Claims, Defenses and Fees § 6.5 (2 ed. 1991(. The municipality, of course, is not entitled to qualify immunity. Official-capacity claims require proof that enforcement of the entity's policy practice caused the violation of federal rights. Id. The record here establishes no official policy or practice of the City on which to predicate official-capacity liability of any defendant named in Counts I, II and III of Amato's Second Amended Complaint. When construed in plaintiff's favor, the record establishes, at most, the existence of concerted action on the part of either four or five people to achieve a questionable objective. Although two of the defendants, Miller and Gooch, were of high rank within the Richmond Police Department, the record does not establish them as policy makers. Accordingly, the defendants in those counts are entitled to summary judgment in their official capacity as

well.

CONCLUSION

The motions for summary judgment on Count I and II of Scott's Amended Complaint and Counts I, II and III of Amato's Second Amended Complaint are granted and those counts shall be dismissed with prejudice. The motions for summary judgment on Count II of Scott's Amended Complaint and Count IV of Amato's Second Amended Complaint are denied and those counts shall be dismissed without prejudice.

The Clerk is directed to send a copy of this Memorandum Opinion to all counsel of record.

It is so ORDERED.

Robert E. Payne
United States District Judge

Richmond, Virginia
Date: 12/15/94

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

ANTHONY M. AMATO
and
A. MICHAEL SCOTT, SR.,

Plaintiffs,

v. Civil Action No. 3:94cv193

CITY OF RICHMOND, et. al.,

Defendants.

ORDER

The Clerk is directed to substitute a revised page 17 in the Memorandum Opinion dated December 15, 1994, amending the second to last lint in the first paragraph to read "proving involuntary consent in a civil action, under Section 1983."

The Clerk is directed to send a copy of this Order to all counsel of record.

It is so ORDERED.

Robert E. Payne
United States District Judge

Richmond, Virginia
Date: December 21, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

ANTHONY M. AMATO
and
A. MICHAEL SCOTT, SR.,

Plaintiffs,

v. Civil Action No. 3:94cv193

CITY OF RICHMOND, et. al.,

Defendants.

ORDER

The Clerk is directed to substitute a revised page 61 in the Memorandum Opinion dated December 15, 1994, amending the third line in the second full paragraph to read "jury, that does not make it necessary to the finding of probable cause."

The Clerk is directed to send a copy of this Order to all counsel of record and the Clerk of the Court of Appeals for the Fourth Circuit.

It is so ORDERED.

Robert E. Payne
United States District Judge

Richmond, Virginia
Date: March 17, 1995

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
April 2, 1996

No. 95-1114
CA-94-193

ANTHONY M. AMATO; A. MICHAEL SCOTT, SR.

Plaintiffs - Appellants

v.

CITY OF RICHMOND; W.R. SHUMAN, Detective, Individually and as a police officer for the City of Richmond; ROBERT HOSICK, Detective Sgt., Individually and as a police officer for the City of Richmond; TERESA P. GOOCH, Captain, Individually and as a police officer for the City of Richmond; LAUREL MILLER, Major, Individually and as a police officer for the City of Richmond; PHILIP MANGANO, Detective Sgt., Individually and as a police officer for the City of Richmond; MARTY M. TAPSCOTT, Chief for the City of Richmond

Defendants - Appellees

v.

UNITED STATES OF AMERICA

Party in Interest

- - - - - - - - - - - - - - - -

On Petition for Rehearing with Suggestion for Rehearing In Banc

- - - - - - - - - - - - - - - -

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Record No. 95-1114

Anthony M. Amato,
A. Michael Scott, Sr.,
Appellants,

v.

City of Richmond, et al.,
Appellees.

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

The plaintiffs filed their actions in the U.S. District Court for the Eastern District of Virginia based upon the existence of a federal question over which that Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. Included in those actions were state law claims over which that Court had pendant jurisdiction pursuant to 28 U.S.C. § 1367.

The District Court entered a final order in those actions on December 15, 1994, granting summary judgment to all the defendants and dismissing the plaintiffs' claims. Plaintiffs filed a timely Notice of Appeal to this Court on January 12, 1995. This Court has jurisdiction in this appeal of that final order pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

Did the District Court err in ruling that the plaintiffs/appellants bear the burden of proof in an illegal search claim under 42 U.S.C. § 1983 and the pendant state law claim on the issue of voluntary/involuntary consent or consent based upon duress?

Did the District Court err in ruling that A. Michael Scott, Sr., voluntarily consented to a search of his and Anthony M. Amato's residence when he followed the orders of his superior police officers to permit the search?

Did the District Court err in ruling that qualified and sovereign immunity protected the defendants on the illegal search claims when A. Michael Scott, Sr., followed the orders of his superior police officers and opened his residence with his key?

Did the District Court err in finding that the

defendants were not liable under 42 U.S.C. § 1983 for the unreasonable seizure of Anthony M. Amato based upon the lack of probable cause, misrepresentations and withholding of material information?

To the extent federal claims survive, should the order dismissing without prejudice pendant state law claims for intention infliction of emotional distress be reversed?

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

Plaintiffs Anthony M. Amato ("Amato") and A. Michael Scott, Sr., ("Scott"), filed separate lawsuits in the U. S. District Court for the Eastern District of Virginia on March 18, 1994 and March 23, 1994, respectively. By Order dated April 29, 1994, the District Court consolidated the cases for all purposes.

On October 3, 1994, the defendants filed Motions for Summary Judgment, and both sides filed memoranda on the Motions. The District Court heard arguments on the Motions on October 21, 1994, and issued an Order dated December 15, 1994 granting all defendants summary judgment on the counts seeking relief under 42 U.S.C. §1983, and the state law claims alleging an illegal search under VA code §19.2-59. The Court also dismissed without prejudice the remaining state law intentional infliction of emotional distress counts, declining to exercise jurisdiction on those claims in the absence of the federal question claims. The District Court on December 21, 1994 issued an Order correcting and amending the December 15, 1994 memorandum opinion.

The Plaintiffs timely filed Notice of Appeal to that final Order on January 12, 1995. Thereafter, on March

17, 1995, the District Court issued an Order, again correcting and amending the memorandum opinion.

B. STATEMENT OF FACTS - PRELIMINARY STATEMENT

Throughout the events giving rise to this lawsuit, the defendants engaged in a course of activity designed to exert emotional pressure Amato and Scott to discover if they were involved with federal authorities in an investigation of police & public corruption in the City of Richmond. This activity included, among other things, an attempt to implicate Officer Scott in criminal activity, trumped up charges against Amato for trespass and extortion, an illegal search of Scott's home and Amato's place of residence, a transfer of Officer Scott based upon his refusal to cooperate in the defendants' improper activities, and harassment of both Scott and Amato.

FACTS

A. SCOTT

Prior to 1991, Scott was a detective with the Richmond Police Department assigned to its Criminal Intelligence Unit. As part of that assignment, Scott was on loan to the Federal Bureau of Investigation for a number of years. (JA 1008). Scott's work with the FBI and with the Criminal Intelligence Unit was exemplary. In fact, Scott received the highest ranking, reserved for unusual excellence, in 1989 and 1990. (JA 1012, 1305-1310).

Scott's work with the FBI included investigations into police corruption within the Richmond Police Department. (JA 1014-1015). One such investigation involved a Richmond Detective assigned to the Homicide

Unit under the command of Captain Teresa P. Gooch ("Gooch"). (JA 1011, 1027). Scott's involvement in the investigation was widely known within the Richmond Police Department. (JA 1038-1039). Chief Marty M. Tapscott ("Tapscott") went to the federal authorities to complain and asked that in the future he be made aware of investigations involving officers in his department. (JA 1028).

Scott also was involved in an investigation along with Det. Sgt. Thomas Clarke ("Clarke") of other Richmond police officers. (JA 1037). Scott was specially assigned to work with Clarke on one investigation by Major Laurel N. Miller ("Miller"), a Deputy Chief of Police. When Clarke and Scott at some point requested that the FBI be brought into the case, Miller refused. (JA 1040).

In June 1991, Scott was reassigned from the Criminal Intelligence Unit and his work with the FBI, to the Detective Division. Tapscott claims that Scott was transferred after his immediate superior, Det. Sgt. Everett Mozingo, had come to him saying that Scott could not be controlled and that he (Sgt. Mozingo) wanted Scott out of the Unit. (JA 1025). Tapscott denied seeking input on the decision to transfer Scott or even discussing that decision with Miller. (JA 1025-1026). Miller claims that he knew nothing about Scott's reassignment, and, in fact knew nothing about Scott's work in Criminal Intelligence or with federal authorities. (JA 1043). Sgt. Mozingo, however, claims that Tapscott appointed Miller to look into the types of investigations Scott was doing with federal authorities, and decide whether that work should continue. (JA 1009). Scott's transfer to the Detective Division placed him under the control of Miller and Gooch.

B. AMATO

Amato has worked as an undercover operative in the past with various federal law enforcement agencies, including the FBI, the Internal Revenue Service, and others. (JA 1068, 1094-1099). In 1987 and 1988, Amato was working with the FBI in the City of Richmond on gambling and narcotics investigations. It was during this time that he met Scott, who was part of the federal task force.

That investigation, which included an operation on gambling commonly referred to as the Rosenbaum matter, resulted in multiple arrests and criminal convictions. Amato performed valuable services to the federal authorities during that investigation. (JA 1021). Amato left Richmond in 1988 after Rosenbaum and worked on other matters for various federal agencies. (JA 1084-1090). In December, 1991, he was between assignments and returned to the area. Prior to his arrival, Amato contacted Scott and asked if he could stay at Scott's house in Chesterfield County. Scott agreed, and they entered into a lease providing Amato a private bedroom and common access to other parts of the house. (JA 1125; 1359).

C. ACOLA'S

Scott had an interest in a partnership that owned a building at 200 E. Main Street in the City of Richmond. (JA 1116-1118). In late 1991, the building was being leased to Kenneth Acola ("Acola"), who operated Acola's Restaurant. At that time, Acola was seriously behind in his rent. Scott engaged Amato to work with the partnership's attorney, W. Todd Benson, Esq. ("Benson"), on the matter. (JA 1119-1120).

(1) January 21, 1992 Incident (the Alleged "Extortion")

On January 21, 1992, upon the legal advice of Benson, Amato and Fred Bilter ("Bilter"), a retired City of Richmond fire-fighter, went to Acola's at the close of business to serve Acola with a letter from the attorney and to change the locks. (JA 1069-1072; 1121-1122). Acola became upset and called the police. Officer Gordon Overstreet ("Overstreet") responded along with other Richmond police officers. At one point Acola was told to calm down or he would be arrested. (JA 455; 1073-1074). Before leaving, Overstreet specifically asked Acola if he had been threatened and whether everything was satisfactory. Acola said that he had not been threatened and that everything was alright. (JA 455; 1146, 1168).

(2) March 22, 1992 Incident (the Alleged Trespass")

On March 22, 1992, Scott became suspicious that Acola was carrying out earlier threats to damage the leased premises. (JA 1123-1124; 1131). Scott contacted Amato, who in turn contacted Benson. Amato and Benson went to the restaurant, but not before requesting the Richmond Police to have an officer meet them. (JA 1315).

Officer Timothy Arthur ("Arthur") met them at 200 E. Main Street. Discovering that the building's locks had been changed, Amato forced open a door to the upstairs, and then he, Benson and Arthur entered the premises. (JA 1075-1076; 1320-1321). The lease expressly gave the landlord (and its agents) a right of access. (JA 1327-1332). In addition, Acola had previously abandoned in court proceedings any possessory interest to that portion of the premises. (JA 1076-1077). Also, some five days prior,

Acola had sold all of his remaining interest in the building and the leased premises to another entity. (JA 1142-1143; 1169-1170; 1333-1140). Amato and Benson discovered that the premises had been damaged. Upon leaving, they advised Arthur that they were going to use some wood on the property (belonging to Scott) to secure the outside door, which they did. (JA 1321-1321).

Acola subsequently filed a complaint against Benson and Amato for burglary and breaking and entering. (JA 1341-1342). He also filed an internal affairs complaint against Scott alleging improper use of police powers. (JA 1343).

D. THE CITY'S INVESTIGATION

Acola's breaking and entering complaint was assigned by Miller and Gooch to Detective Sgt. Robert Hosick ("Sgt. Hosick"), and during his investigation Hosick followed the orders of Miller and Gooch. (JA 1193).

Hosick's investigation focused also on efforts to link Scott to illegal activity. According to Detective Buddy Sipple ("Sipple"), who handled the Internal Affairs complaint by Acola, Miller and Gooch were behind Hosick's investigation and they were "after" Scott. (JA 1192-1194).

Miller also stayed close to the Internal Affairs investigation of Scott. (JA 1174-1177). Sipple felt pressured by Miller to find that Scott had violated department rules and regulations, although Sipple's investigation was revealing that no such violations had occurred. (JA 1178-1183).

E. THE FEARED "FEDERAL INVESTIGATION"

During the City's investigation, the defendants began to believe that Scott and Amato were setting up an undercover operation with federal authorities on Richmond police and city personnel. Acola told both Hosick and Detective William R. Shuman ("Shuman") that Scott, Amato and an FBI Special Agent attempted to set Acola up on an investigation of corrupt city officials. (JA 1018-1019, 1022; 1133-1134; 1223-1224; 1344-1346).

Then Assistant Commonwealth's Attorney William H. Parcell, III, ("Parcell"), also had conversations with Hosick, Gooch and Miller at this time indicating that Amato was an informant set up by the FBI to investigate the police department and official corruption. (JA 1241, 1246-1248). Parcell mentioned that Amato had worked on at least four police officers of whom he was aware. (JA 1241). Similarly, Shuman developed a theory that Scott and Amato were attempting to kick Acola out of his restaurant to set up a federal investigation into public corruption, (JA 1137, 1140-1141; 1151-1152), and he has admitted he discussed this theory with both Gooch and Hosick, among others. (JA 1133-1136, 1138-1139, 1151-1155, 1162-1163).

Other defendants considered as well that a federal investigation involving Amato or Scott was a distinct possibility. Miller admitted that he had concerns that an ongoing investigation might be impacted by his Department's investigation of Amato. (JA 1064-1066). In addition, Gooch stated that she felt Scott was acting as if he was on some secret federal investigation. (JA 958).

To discover what the federal investigation entailed, Hosick confronted Scott at the direction of Gooch and demanded to know what Amato was working on and

whether he was investigating any police officers in the City. When Scott insisted that he did not know what Amato was working on, Hosick stated: "Listen Mike, if he's working on any Richmond [police department] people, and we think he is, you gotta' tell me." (JA 1126-1127; 1350).

Interestingly, a similar inquiry was made to Amato upon Amato's later surrender and arrest. Hosick admitted to Amato that "they" knew he had done nothing wrong; however, "they" were out to get Scott. Hosick also told Amato that if he would just tell them who he was working on, then the matter would be over in a couple of days. (JA 1359-1360).

F. THE TRESPASS CHARGE

Acola went first before Magistrate John Thomas, who interviewed Arthur, and refused to give Acola a warrant for either Amato or Benson. (JA 1321). During his investigation, Hosick personally went to yet another magistrate, A. Christine Browning, to secure a warrant against Amato. (JA 1362). She similarly refused to issue a warrant. (JA 1363). Hosick's notes indicate that at the conclusion of his investigation, no probable cause existed to charge Amato with a crime, and he recommended that the offense report be carried as "unfounded". (JA 1203-1204; 1367). Such a finding normally concludes an investigation. (JA 1335).

Hosick, however, after advising Scott, Benson and Acola that no charges would be brought, after concluding his investigation, and after having the Commonwealth Attorney's office review and concur in his finding, took it upon himself to call upon yet a third magistrate - Chief Magistrate William R. Shannon ("Shannon"). Hosick withheld from Shannon, that Acola had no possessory

interest in the property at the time of the alleged trespass; that Amato was acting as agent for the landlord at the time of the entry; that the lease clearly gave the landlord the right of entry; that two other magistrates had denied a warrant based upon the same information; and that Acola had given false information in at least two previous instances. (JA 1205-1209, 1214-1220).

Hosick's own notes reflect that Acola would have trouble obtaining any charge against Amato based upon the lease provision giving the landlord (Scott & Scott Investments) and its agent (Amato) access to the premises. (JA 1318).

Shannon indicated that he would give Hosick a warrant if there was a previous occasion where Acola had told Amato not to come back upon the premises. (JA 1322). Hosick then called Acola, met with him at the police department, and told Acola what Shannon had said. (JA 1211-1212). At this point, Acola complained for the very first time that during the January 21st lock-changing incident, he had told Amato not to come back. (JA 1210-1212).

Hosick immediately took Acola to Shannon, introduced him, and left only to return to pick up the warrant. (JA 1212-1213).[1] Thereafter, Hosick called Scott and informed him that a warrant has been obtained. Scott advised that Amato was out of town, but said that when he heard from Amato, he would have Amato contact Hosick to discuss the matter. (JA 1323).

---

[1]However, the Complaint for the Warrant was not notarized or otherwise subscribed before a competent officer as required under Va Code §19.2-20. (JA 619-620).

G. THE SEARCH

Six days later, on the morning of Thursday, April 16, 1992, Parcell met with Miller, Gooch and Hosick. (JA 1246; 1323). Parcell said that Scott and Benson had gone to speak with an Assistant United States Attorney in an effort to have Amato's trespass warrant quashed. They discussed that this was unusual. (JA 1243-1245; 1323). They also expressed concerns that Amato was living in Scott's home. (JA 1249-1250). They felt that Scott might be committing a crime by harboring a fugitive.(JA 1250). As they further discussed what to do, Miller told Parcell that he would call Scott into his office and question him about Amato. (JA 1250).

Miller, Gooch and Hosick then discussed the situation among themselves. Miller decided to have Scott accompany Hosick to Scott's home to arrest Amato because Scott could provide access to the home if necessary. (JA 973; 1050-1054). Miller stated if Amato had been found at home but refused to answer the door, then Scott would have had a duty to arrest Amato. (JA 1052). Miller then called Internal Affairs to inquire if they would participate in questioning Scott and/or go to Scott's home. Captain William Robertson ("Robertson") and Sipple of Internal Affairs (who were still investigating Acola'a complaint against Scott) came to Miller's office.

Sipple, apprehensive about the matter, asked his supervisor, Robertson, to get him out of any trip to Scott's home. (JA 1186, 1188). He had already felt pressure from Miller to find that Scott had committed some wrongdoing. (JA 1178-1179). He also was well aware that Miller and Gooch were "after" Scott. (JA 1184-1185; 1193-1194). He did not want to participate in the trip because he felt that Scott might be ordered to open up his home, which, from his experience, would amount to an illegal search. (JA

1188-1189).

Miller was asked if he intended to handle the matter "administratively" or "criminally". (JA 1187, 1263, 1268). If the matter was to have been handled "administratively", Scott would have been read his "Patrolman's Bill of Rights" and would have been required to sign the "Bill of Rights" form. (JA 1264-1267, 1277-1278). When Miller announced that the matter would be handled "criminally" and that Scott would not be read his Patrolman's Bill of Rights, Robertson and Sipple left and refused to participate. (JA 1187, 1264-1265).

Gooch then called the First Precinct and spoke with Scott's supervisor, Clarke. She said that Scott was to report to Miller's office. (JA 1035). Clarke indicated that Scott was busy preparing a search warrant and asked for some additional time. Initially, he was allowed twenty minutes. Approximately five minutes later, however, Gooch called again and said that Scott was to report immediately to Miller's office. (JA 1036).

Scott met Gooch and was taken to Hosick's office and left there with Hosick. (JA 1128-1129; 1351). Subsequently, they were called into the Miller's office.

Miller asked if Scott knew that there existed an arrest warrant for his roommate. Scott responded that Hosick had made him aware of that fact. Scott told Miller that Amato was out of town, just as he had advised Hosick six days earlier. (JA 1351).

Miller ordered Scott to go with Hosick to his home and arrest Amato. Scott again reminded that Amato was not at home. Scott also reminded the Major that he did not have arrest powers in Chesterfield County. Miller responded in a loud and menacing manner that he was ordering Scott to go to his home to arrest Amato. (JA 1351). Miller expected his order to be followed and Scott

could have been subjected to disciplinary charges had he failed to follow such an order. (JA 1047-1048). As Scott and Hosick prepared to leave, Miller said to Hosick, "don't let him [Scott] out of your sight until you search." (JA 1351-1352). He also instructed Hosick to obtain the assistance of another sergeant.

Hosick enlisted the assistance of Det. Sgt. Philip Mangano ("Sgt. Mangano"). Scott told Sgt. Mangano that he had been ordered by Miller to go to his house. During the trip to Chesterfield County, Scott complained about being ordered by Miller to go to his home. He advised once again that Amato was not at the house. (JA 1352).

A Chesterfield County police officer was met at a nearby rescue squad. They all then travelled to Scott's house. Upon arrival, and in the presence of Sgt. Mangano, but not the Chesterfield police officer, Hosick directed Scott: "Mike, we've got to look in the house". (JA 1352). While he denies making such a statement, Hosick admits that he would have been without authority to have issued such an order and that such an order would have been improper. (JA 1226-1227).

Hosick, the Chesterfield police officer and Scott proceeded to the front door while Sgt. Mangano went to the rear of the house. Scott mentioned to the Chesterfield officer that he was "embarrassed" by the situation (JA 1280; 1352) however, he had been ordered to go along. He also told the Chesterfield officer that no one was at home.

The Chesterfield officer was handed the warrant and knocked on the door. When no one answered, as expected, Scott opened the front door as he had been so ordered to do. (JA 1352). Scott followed the Chesterfield officer into his home. Hosick entered and searched the

premises, including Amato's bedroom. When Hosick searched Amato's bedroom, Scott was not present. (JA 1352-1353). However, Scott heard a closet door being opened. (JA 1130). Hosick seized several items from Amato's bedroom, including a subpoena which bore Amato's federal code name "Mattie". (JA 1078-1082). Sgt. Mangano subsequently entered the home and participated in the search. (JA 1353). When Scott returned to the First Precinct, he complained about the illegal search. (JA 1284, 1394). He subsequently talked with Captain A. Christine Bailor ("Bailor"), the Officer in Charge of the First Precinct, who advised Scott to secure legal assistance, as his constitutional rights might have been violated. (JA 1394).

Bailor complained on behalf of Scott to Robertson, the Officer in Charge of Internal Affairs, who indicated that he was already aware of the matter. Bailor then protested to Tapscott, who advised that he also was aware of the matter and that there were things about which Bailor was unaware and did not need to know. (JA 1394).

Miller, Gooch and Tapscott all deny knowing that after the April 16 incident, Scott was claiming his home had been illegally searched. (JA 1029; 1061; 1236-1237; 1359).

Scott's complaint, however, was well known throughout the department. (JA 1190). Moreover, one or two days after the search, Gooch, Hosick and Parcell met and discussed Scott's claim that Scott's home had been illegally searched and that papers had been taken. (JA 1251-1252). In addition, Scott's claim of an illegal search was included in papers later reviewed by both Tapscott and Miller pursuant to a grievance Scott filed over his subsequent transfer from the Detective Division to Patrol Operations. (JA 1030-1031; 1062-1063; 1369-1370). Tapscott does not

recall whether Bailor talked to him about an illegal search, but said that if such an allegation had been brought to his attention, he would have initiated an investigation by the Internal Affairs Unit. (JA 1032-1033). Bailor clearly advised the Chief about the claim, yet there was no investigation. (JA 1394).

Tapscott was similarly advised by yet another Richmond Detective, John Harris, that he should look into the harassment of Scott at the hands of his supervisors, Gooch and Miller. (JA 1288-1291). Once again this prompted no action by the Chief.

H. OFFICER SCOTT'S TRANSFER

The day after the illegal search, Gooch prepared a memorandum to Miller recommending that Officer Scott be transferred. (JA 1371-1372). Curiously, Gooch can not recall what "prompted" her to write this memorandum. (JA 1231-1232). In that memorandum, however, she cites three incidents about which Miller was already aware. (JA 1231-1233).

During her tenure as Captain of the Detective Division, Gooch has recommended but only two involuntary transfers. One was Scott. The other was Detective Douglas Moore ("Moore"), who, like Scott, had previously worked with federal agencies and was also involved in the Rosenbaum investigation. (JA 1101-1102).

Subsequently, Miller prepared a short memorandum to Tapscott recommending that Scott and others be transferred. (JA 1373). No explanation was given at that time by Miller to Tapscott. (JA 1044-1045; 1056-1060). The procedure followed by Miller and Gooch was not in keeping with the Department's policies relating to involuntary transfers. (JA 1055-1056).

I. THE EXTORTION CHARGE

Acola's restaurant was burned by an arsonist on or about April 22, 1992. Det. W. R. Shuman ("Shuman") was assigned to investigate the arson, and periodically updated Gooch on his progress.

During his investigation, Shuman developed information which he believed confirmed the validity of his theory about Amato, Scott and a federal investigation. (JA 1151-1152; 1162-1163). For example, he spoke with Robert Williamson, a person that Amato had helped convict during the Rosenbaum investigation. Williamson told Shuman that Amato worked with an IRS agent and an FBI agent, and that the "overall plan of the investigation was to see what police/judge/or other city official he [Williamson] would go to if he was arrested." (JA 1379).

Shuman attempted to find out from several federal officials whether Amato was, in fact, still working for them. He spoke with an Assistant United States Attorney and asked whether Amato was currently working with the Drug Enforcement Agency. (JA 1382).

Shuman attempted to find out if Scott was passing information to the FBI and the IRS about Richmond police officers. Shuman's notes include the following: "FBI How about Mike Scott. Did he give names of policeman [sic]- who were they." Immediately next to this note Shuman wrote: "Same? IRS". (JA 1381). Shuman also attempted to discover what he could about Amato's secret federal code name "Mattie" which he gave to a Richmond Police Lieutenant to check with federal sources. (JA 1293-1296). The officer remembers that the name was a "very unusual", "one-word" name. (JA 1293-1296). The code name "Mattie" appeared on a U.S. Marshall's

Service facsimile cover sheet attached to a witness subpoena for Amato, which coincidentally, disappeared at the time of the search of Scott's home.

Shuman became fearful that federal authorities were somehow involved in his investigation. (JA 1160). He believed that papers relating to the FBI and Amato were stolen from his office. (JA 1156-1159). He also complained to others that his computer had been tampered with. (JA 1229).

Moreover, for reasons unknown to Shuman, another Richmond Detective began investigating the fire at Acola's. (JA 1172). When that detective later participated in the indictment of Acola for the arson, Shuman pulled him aside, yelled at him, and asked if the FBI "had his rear-end in a crack" or if he was working for Mike Scott. (JA 1298-1300).

With this background, Shuman sought to bring another charge - a felony - against Amato. (JA 1378). At some point, he asked Parcell to obtain phone records for Scott's house, for Scott's girlfriend's house, and for a cottage of Scott's aunt in the country. (JA 1257-1259). Although Scott had said that Amato was out of town, Shuman suspected Scott knew of his whereabouts. The phone records might reveal long distant calls to and collect calls from Amato. (JA 1259). If Amato was found in another state he could not be extradited on the misdemeanor trespass charge, but a felony charge against Amato might ensure extradition.

Later, Acola recounted to Shuman the January 21, 1992 lock-changing incident. According to Shuman's own notes, however, Acola never told Shuman that Amato had threatened him during that incident. (JA 1164-1165). Shuman maintains that Acola did tell him that he had felt threatened by Amato. Incredibly, the "threat" Acola

perceived was that he would be beaten with a five-pound Genoa salami which Bilter had purchased from Acola. Acola claimed such a beating would leave no marks. (JA 1171).

Shuman took some information to Parcell in an effort to obtain an indictment against Amato. (JA 1253-1256). According to Parcell, the key evidence supporting an indictment was a statement Shuman attributed to Bilter - that Bilter saw "fear" in Acola's eyes. (JA 454; 1253-1256). Bilter, however, denies ever telling Shuman that he saw "fear" in Acola's eyes or that Acola was scared. Rather, Bilter told Shuman that Acola was mad. (JA 454; 1303).

Once indicted, Amato was instantly placed by Shuman on the City's "Ten Most Wanted" list, and a poster bearing his likeness was widely circulated. (JA 1384). Amato eventually surrendered on that charge, was released on a summons on the trespass charge, detained for ten hours, and then released on a $10,000 bond. The extortion charge was subsequently nolle prossed, and the trespass warrant dismissed. (JA 458-460).

J. OTHER INCIDENTS

Shuman told at least four people that Amato set the fire at Acola's restaurant. (JA 456; 1104-1114; 1302; 1385; 1389). On separate occasions Shuman stated that he had a gas can with Amato's fingerprints, (JA 454; 1302; 1385; 1389). although he now admits that he never had such evidence. (JA 242; 1144-1145).

SUMMARY OF ARGUMENT

In stating a civil claim under 42 U.S.C. § 1983, plaintiffs do not bear the burden of proving the absence

of voluntary consent to a warrantless search of their residence as the District Court below suggests. Plaintiffs must initially show that a warrantless search occurred, thus placing themselves within the general rule that warrantless searches are per se unreasonable. The burden then rests upon the government to prove that its conduct was justified by some exception to the general rule.

The disputed facts and the agreed upon facts in this case raise a genuine issue as to whether one of the plaintiffs consented to the warrantless entry and search of his residence, or whether he simply acquiesced to a directive (or coercion) of his superiors. Voluntary consent is a factual matter to be resolved upon the totality of the circumstances developed at trial, rather than at the summary judgment stage.

The defendants are not entitled to qualified or sovereign immunity (and, therefore summary judgment) as suggested by the District Court below because (i) the law has "clearly established" a citizen's right to be free from warrantless searches and the requirements for "consent" to enter a citizen's home, and (ii) the defendants could not "reasonably" ignore that law. The District Court ignored facts properly pleaded and other facts submitted through depositions and affidavits, and failed to resolve issues of disputed testimony in a light most favorable to the plaintiffs while granting summary judgment to defendants.

ARGUMENT

A. STATEMENT OF THE APPLICABLE STANDARD OF REVIEW

In reviewing a District Court's grant of summary judgment, the Court of Appeals is bound by the same standard as that used below. e.g., United States v. Ringley

, 985 F.2d 185 (4th Cir. 1993). Summary judgment can be rendered "if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Under subsection (e) of Rule 56: the party opposing the motion for summary judgment "must set forth specific facts showing that there is a genuine issue for trial."

The court is not to weigh the evidence, but must determine whether there is "sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The nonmoving party "need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial." Id. at 257. Furthermore, "the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. at 255.

As stated in Ross v. Communications Satellite Corp, 759 F.2d 355, 364 (4th Cir. 1985):

> The nonmoving party is in a favorable posture, being entitled 'to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, all internal conflicts in it resolved favorably to him, the most favorable of possible alternative inferences from it drawn in his behalf; and finally, to be given the benefit of all favorable legal theories invoked by the evidence as considered.'

B: DISTRICT COURT ERRED IN RULING THAT THE PLAINTIFFS/APPELLANTS BEAR THE BURDEN OF PROVING THE ABSENCE OF VOLUNTARY CONSENT TO A WARRANTLESS SEARCH

As the District Court noted, there is a conflict among the federal courts as to which party bears the burden of proving allegedly consensual searches. The Second, Fifth and Ninth Circuits place the burden on the plaintiff to disprove a defendant's claim of consent to the search. See Ruggiero v. Krzeminski, 928 F.2d 558, 563 (2nd Cir. 1991); Crowder v. Sinyard, 884 F.2d 804, 824-26 (5th Cir. 1989); Larez v. Holcomb, 16 F.3d 1513, 1517 (9th Cir. 1994). The Sixth Circuit and the U.S. District Court of Minnesota assign the burden of proof to defendants who claim that consent justified a warrantless search. See Tarter v. Raybuck, 742 F.2d 977, 980-01 (6th Cir. 1984); Huotari v. Vanderport, 380 F. Supp. 645, 648 (D. Minn. 1974).

The District Court below adopted the view that the burden of proof rests on the plaintiffs for two reasons. First, the government bears the burden of proving consent in criminal cases because the government must prove its case beyond a reasonable doubt. In the civil context, however, the plaintiff should be required to prove all elements of the claim including a lack of consent. According to the District Court, treating the issue of consent differently in criminal and civil cases is justified because of the parties' overall burden of proof on the case. However, this rather mechanical approach to allocating the burden of proof on consent searches ignores the important constitutional considerations that have guided the Supreme Court's decisions on consensual searches.

The standard for voluntary consent was established in Schneckloth v. Bustamonte, 412 U.S. 218, 223 (1973) where the Court cautioned against "mechanical" application of rules surrounding voluntariness. The Court made no reference to the government's overall burden of proof in a criminal case, nor did the court consider who was the moving party on a suppression motion, nor any procedural rules surrounding presumptions and shifting burdens of producing evidence. Instead, the Court sought guidance from its confession cases, and noted that "'voluntariness' has reflected an accommodation of the complex of values implicated in police questioning." Id. at 224. The Court recognized that similar values were implicated in the Fourth Amendment context, specifically, "two competing concerns [which] must be accommodated in determining the meaning of a 'voluntary' consent - the legitimate need for such searches and the equally important requirement of assuring the absence of coercion." Id. at 226. The burden of proving free and voluntary consent was then assigned to the government because "the requirement of a 'voluntary' consent reflects a fair accommodation of the constitutional requirements involved." Id. at 229.

The federal courts must accept this fair accommodation and follow a consistent approach to proving consent in both criminal and civil cases because the constitutional considerations do not change according to the identity of the moving party. The important constitutional consideration is the Supreme Court's recognition that warrantless searches are per se unreasonable, "subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967). These exceptions are "jealously and carefully drawn," Jones v. United States, 357 U.S. 493, 499 (1958), and "this is especially true when government

authorities intrude into a person's dwelling." Huotari v. Vanderport, 380 F. Supp. at 648.

Huotari accepted Schneckloth's accommodation of constitutional principles and assigned the government the burden of proving voluntary consent in §1983 cases because "the right of officers to thrust themselves into a home is ... a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance." Huotari v. Vanderport, 380 F. Supp. at 648. As Huotari does, the federal courts must look beyond the concerns of the parties in a particular case in order to give effect to society's interest in limiting warrantless searches. In both criminal and civil cases, the societal interest in prohibiting warrantless searches requires that the government prove the consenting party "freely and intelligently [gave her] unequivocal and specific consent to the search, uncontaminated by any duress or coercion, actual or implied." United States v. Morrow, 731 F.2d 233, 236 (4th Cir. 1984).

The second reason the District Court below assigned the burden of proof to the plaintiffs was because the Court found Tarter v. Raybuck, 742 F.2d 977 (6th Cir. 1984) to be "unpersuasive." The Tarter decision was deemed unpersuasive because it placed the burden of proof on the government by invoking "a presumption against the waiver of constitutional rights." Id. at 980. The District Court recognized that such a waiver theory was rejected by Schneckloth in favor of a totality of the circumstances test. Tarter, however, is a very persuasive attempt to be faithful to Schneckloth's accommodation of conflicting constitutional principles.

Schneckloth declined to hold the government to proving a knowing and intelligent waiver of Fourth

Amendment rights because of the unique operation of the Fourth Amendment exclusionary rule in criminal cases. The Schneckloth Court noted that unlike the Sixth Amendment right to counsel, which requires a knowing and intelligent waiver, waiver of Fourth Amendment rights is affected by the exclusionary rule which excludes otherwise relevant evidence and thus defeats the truth-seeking function of adjudication. See Malley v. Briggs, 475 U.S. 335, 344 (1986) ("While we believe the exclusionary rule serves a necessary purpose, it obviously does so at a considerable cost to society as a whole, because it excludes evidence probative of guilt"). Because of concerns over the truth-defeating effects of the exclusionary rule, Schneckloth refused to impose on the prosecution the heavy burden of proving that there was a knowing and intelligent waiver of Fourth Amendment rights. Schneckloth nonetheless placed the burden of proving voluntary consent upon the government. Once again, the Supreme Court resolved conflicting constitutional principles by accommodating the favored rule requiring a knowing and intelligent waiver of constitutional rights when balanced against the disfavored consequences of the Fourth Amendment exclusionary rule.

This delicate balance of conflicting Fourth Amendment principles is nullified by the District Court's decision to place multiple burdens on §1983 plaintiffs. According to the District Court, the government is relieved of the need to prove waiver of a constitutional right, while at the same time, plaintiffs claiming that the government conducted an unreasonable search must prove a negative - the absence of voluntary consent. As Justice Marshall cautioned in Schneckloth "courts have traditionally been reluctant to require a party to prove negatives such as the lack of knowledge" or consent. Schneckloth v. Bustamonte, 412 U.S. at 286 (Marshall, J., dissenting).

The exclusionary rule is not applicable in §1983 litigation, thus there is no need to apply what Schneckloth, 412 U.S. at 245 conceded was a "diluted form of waiver." In Malley v. Briggs, 475 U.S. at 344 the Court noted that unlike the societal costs associated with the exclusionary rule:

> a damages remedy ... imposes a cost directly on the officer responsible ..., without the side effect of hampering a criminal prosecution. Also, in the case of the §1983 action, the likelihood is obviously greater than at the suppression hearing that the remedy is benefiting the victim of police misconduct one would think most deserving of a remedy - the person who in fact has done no wrong, and has been arrested for no reason, or a bad reason.

Unfettered by the need to adjust Fourth Amendment law to account for the exclusionary rule, Tarter v. Raybuck, 742 F.2d 977 and Huotari v. Vanderport, 380 F. Supp. 645, give appropriate effect to the general presumption against waiver of constitutional rights and represent the proper view of how to allocate the burden of proof in §1983 cases. First, the plaintiffs must initially prove that a warrantless search occurred and thus place themselves within the general rule that warrantless searches are per se unreasonable. Second, the burden of proving an exception to the general rule then rests upon the defendants who seek to justify conduct which is per se unreasonable. When government officials claim that they fall within a "jealously and carefully drawn" exception to the prohibition against warrantless searches, these government officials rightly bear the burden of proving the exceptional circumstances that justify their generally prohibited conduct. In placing the burden of

proving consent on the government, Schneckloth v. Bustamonte, 412 U.S. at 228, invoked the "classic admonition" of Boyd v. United States, 116 U.S. 616, 635 (1886):

> constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon.

There remains only one concern unique to §1983 cases, and thus beyond the considerations resolved in Schneckloth. The Supreme Court has recognized the need to protect government officials from frivolous §1983 suits. However, this legitimate concern does not justify placing excessive procedural hurdles in the path of a §1983 plaintiff who has demonstrated the gravity of his claim by proving that a warrantless search occurred and that such warrantless searches are per se unreasonable. The present case is not the type of frivolous §1983 claim that troubles the courts or justifies summary judgment against the plaintiffs. This case involves a decorated police officer who was not suspected of nor charged with any crime. This officer's home was searched without a warrant, without probable cause, and in violation of police department policy requiring the execution of a written consent to search form. Scott has proven that he was the victim of a warrantless search, and standing alone this states a §1983 claim worthy of careful scrutiny unless and until the government can prove that its warrantless entry was justified by some exception to the rule that

warrantless searches are per se unreasonable. The Supreme Court's mandate to discourage warrantless searches dictates that those who conduct warrantless searches bear the burden of justifying their need to engage in such prohibited practices.

C. THE DISTRICT COURT ERRED IN RULING THAT SCOTT VOLUNTARILY CONSENTED TO A WARRANTLESS SEARCH OF HIS HOME

The District Court dismissed the illegal search claims asserted under 42 U.S.C. § 1983 and Va code §19.2-59 based upon a the finding that Scott voluntarily consented to the search as a matter of law. However, even if the plaintiffs are required to meet the burden of proof on the consent issue imposed on them by the District Court, that burden has been met. As Larez v. Holcomb, 16 F.3d 1513, 1517-18 (9th Cir. 1993) noted, allocation of the burden of proof would have impact

> only if one side had failed completely to adduce any evidence or if the jury had found the evidence equally compelling on both sides. As a practical matter, if the jury determined that a preponderance of the evidence supported either of the parties, the formal placement of the burden would not have had any effect.

In opposing a motion for summary judgment the burden placed on a plaintiff is to "only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial." Anderson v. Liberty Lobby, Inc., 477 U.S. at 257. Summary judgment is seldom appropriate where state of mind or intent to consent to a search is a material issue. See Parkerson v. Federal Home Life Ins. Co., 797 F.Supp.

1308, 1315 (E.D. Va. 1992). This is because "resolution of questions of intent often depends upon "'the credibility of the witnesses, which can best be determined by the trier of facts after observation of the demeanor of the witnesses during direct and cross-examination." Ross v. Communications Satellite Corp., 759 F.2d at 364. Moreover, questions as to a party's state of mind usually involve drawing factual inferences as to which reasonable people might differ, which is the responsibility of a jury, not the Court. Parkerson v. Federal Home Life Ins. Co., 797 F.Supp. at 1315.

As the District Court noted, the test for consent "is subjective to the extent that it turns on whether the consenting individual actually gave his consent freely and voluntarily." (JA 829). See United States v. Wilson, 895 F.2d 168, 171-71 (4th Cir. 1990) ("the determination of consent is subjective" and "determined by the totality of all the circumstances"). Although the District Court applied the correct standard, it was improperly applied to the following facts found by the District Court. (JA 831-832):

"1. Under circumstances indicating some urgency, Scott was instructed by Gooch to abandon preparation of a search warrant and to report to Miller's office.

2. Scott complied and, about twenty minutes after arriving at Miller's office, met with Miller, Gooch, and Hosick. During that meeting Miller inquired whether Scott was aware that a warrant had been issued for the arrest of Amato on trespass charges arising out of the March 22, 1992 incident at Acola's restaurant.

3. Scott responded that Hosick previously had informed him of the warrant and advised Miller that Amato intended to surrender upon return to Richmond at an unspecified date.

4. Miller, in "a shrill and menacing tone," then said: "I am ordering you to go to your house and arrest your roommate right now." Scott replied that Amato was out

of town and that Scott did not possess the power to effect an arrest in Chesterfield County, the location of the residence he and Amato shared.

5. Pointing his finger at Scott and using a "vociferous and more menacing tone of voice," Miller said: "I am ordering you to go." Hosick was then instructed by Miller to take another officer on the mission and "not [to] let Scott out of your sight until you search."

6. Scott, Hosick and Mangano (whom Hosick had enlisted to help on the arrest mission) travelled in the same car and, en route, Scott repeated that Amato was not at the house and "voiced [his] displeasure over being called in from an investigation and ordered by Major Miller and to my place of residence to arrest Amato, who was not even in town."

7. As Hosick, Mangano and Scott exited the car upon arrival at the residence, Hosick said: "Mike, we've got to look in the house."

8. Mangano was dispatched to the rear of the house and Hosick and Scott, along with Officer Horowitz from Chesterfield County who was to serve the warrant, walked from the street to the porch, and, en route, Scott informed Horowitz that he "was 'embarrassed' by the situation, but had been ordered by Miller to participate."

9. When they arrived at the front door, Horowitz knocked but there was no answer and, according to Scott, "... under duress, I opened the door." Undisputed evidence shows that there was no conversation after Horowitz knocked and that Scott opened the door with his key.

10. Scott, Horowitz and Hosick entered the house through the front door. They were joined later by Mangano who entered through the rear door[2] at the invitation of

---

[2]Contrary to the District Court's finding, Mangano entered through the front door without invitation of Hosick.

Hosick. All but Scott looked through the house. Finding that Amato was in fact not there, the others left."

After recounting the above facts, the District Court disregarded all of Miller's statements to Scott because the statements constituted "an order to go to his house and arrest Amato, not to search." (JA 833). Under these facts, however, the distinction between an arrest and a search is without constitutional significance. The government's entry of a private dwelling constitutes an intrusion upon privacy and is a search regardless of whether the intrusion is designed to procure evidence or secure the arrest of a suspect. New York v. Payton, 445 U.S. 573 (1980). Miller's own affidavit states that he "concluded that Scott should participate in the arrest because it was his house, and he could provide access, if necessary." (JA 973). In effect, Miller ordered Scott to "go to your house, provide access for these other officers, and arrest Amato." An order to enter the house and arrest is an order to search within the meaning of the Fourth Amendment.

Miller himself referred to the intrusion into Scott's house as a search when he instructed Hosick (who outranked Scott) to take charge of the search team and "not [to] let Scott out of your sight until you search." (JA 831, 832). In turn, Hosick understood that he was to carry out Miller's order to enter Scott's dwelling and Hosick subsequently admitted, "I just do what I am told to do." (JA 1359). When Scott protested that he was embarrassed by this whole affair and his treatment by Miller, Hosick issued an additional order - "Mike, we've got to look in the house." (JA 831).

The District Court discounted Hosick's order because "Hosick slightly outranked Scott." (JA 834). But the word "slightly" has no significance in a paramilitary

organization such as the police department, which operates under an exacting chain of command and control. Subordinate personnel may not refuse to obey an order because the superior issuing the order is only "slightly" higher in rank. Accepting the plaintiffs' facts as true and giving effect to all favorable inferences, it is clear that two superior officers ordered Scott to open his home to an intrusion by police officers.

Assuming there was an order to search, the District Court nonetheless discounted the coercive effect of this order because Scott failed to resist the entry of his home by explicitly invoking his Fourth Amendment rights. Failure to resist an entry, however, does not constitute consent. See, Johnson v. United States, 333 U.S. 10, 12-13 (1948) (search not voluntary where police officer knocked on door, identified himself, and said "I want to talk to you a little bit"); United States v. McCraw, 920 F.2d 224 (4th Cir. 1990) (partially opening door to determine identity of officers does not constitute consent); Walls v. Commonwealth, 2 Va. App. 639, 347 S.E.2d 175 (1986) (police entry through an open door, and the resident's failure to order them to leave, does not constitute impled consent).

The District Court acknowledged the above cases and conceded that "one is not required to protest an unreasonable search to preserve his constitutional rights." (JA 836). Nonetheless, the District Court treated Scott's failure to explicitly invoke his Fourth Amendment rights as establishing voluntary consent. But on a motion for summary judgment the plaintiff need only prove that there is an issue as to whether he "freely and intelligently [gave her] unequivocal and specific consent to the search, uncontaminated by any duress or coercion, actual or implied." United States v. Morrow, 731 F.2d 233, 236 (4th Cir. 1984).

Scott's lack of free and unequivocal consent is apparent from his protest against the ordered search on five different occasions. (1) When summoned by Miller, Scott protested against participating in the search because he was busy with other duties; (2) Scott protested to Miller that the entry of his house would be futile because Amato was out of town; (3) Scott advised Miller that Scott was without the power of arrest in Chesterfield County; (4) on the trip to Scott's house, Scott voiced his displeasure over being ordered by Miller to enter his home in a futile attempt to arrest Amato; (5) after returning to headquarters, Scott complained to his superior, Bailor, that he had been victimized by an unlawful search.

The five occasions on which Scott protested against going to his house to arrest Amato can be seen as a reasonable attempt by a subordinate to differ with the orders of a superior officer without throwing down the gauntlet of open defiance or a blatant challenge to authority. On a motion for summary judgment, the plaintiffs are entitled to this reasonable interpretation of Scott's protests.

The District Court also concluded that the order to search was not sufficiently coercive because there was never any explicit threat of discipline for refusal to consent to the search. However, the Fourth Amendment requires "that a consent not be coerced, by explicit or implicit means, by implied threat or covert force." Schneckloth v. Bustamonte, 412 U.S. at 228. The District Court disregarded the implied threat of discipline for failing to obey Miller's and Hosick's orders because Scott "is charged with knowledge that he could not be disciplined for exercising his constitutional right to refuse entry even if ordered. (JA 835). In fact, the District Court ignored Millers own admission that Scott could have been

disciplined if Scott had not followed Miller's order. (JA 1047-48). The correct test is not whether Scott was aware of his constitutional rights in some abstract sense, but whether Miller's implied threat interfered with Scott's subjective ability to "freely and intelligently [give his] unequivocal and specific consent to the search, uncontaminated by any duress or coercion, actual or implied." United States v. Morrow, 731 F.2d at 236. In the abstract, Scott might have hypothesized that after years of litigation some court or police review board might ultimately vindicate his right to refuse an unlawful order to search. Implied threats of discipline, however, impact on Scott's subjective state of mind regardless of whether those threats are legal or illegal. To state an extreme example, a police officer who threatens a homeowner - "Let me in your house or I'll hit you with this Billy stick" - cannot claim voluntary consent on grounds that the homeowner should have recognized that the threat was illegal. If Scott concluded that he faced discipline (proper or improper) for refusing the order to search, this indicates that he did not freely and voluntarily consent, instead he merely bowed to the threat and acquiesced to the illegal order. See Schneckloth v. Bustamonte, 412 U.S. at 229 (account must be taken of the "possibly vulnerable subjective state of the person who consents").

Even patently illegal orders to search negate free and voluntary consent because "when a law enforcement officer claims authority to search a home ..., he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion - albeit colorably lawful coercion. Where there is coercion there cannot be consent." Bumper v. North Carolina, 391 U.S. 543, 550 (1968). In short, "compliance with a police 'demand' is not consent," U.S. v. Winsor, 846 F.2d 1569, 1573 (9th Cir. 1988), and a lack of voluntary consent is inherent in all police commands, "even those put in the

form of polite requests". United States v. Shepherd, 714 F.2d 316, 318 (4th Cir. 1983); see also United States v. Griffin, 530 F.2d 739, 742 (7th Cir. 1976) ("subtle coercion, in the form of an assertion of authority or color of office by the law enforcement officer may make what appears to be a voluntary act an involuntary one").

The extent of the "police command" in this case and its impact on Scott's subjective ability to make a free and voluntary choice is a factual issue to be resolved based upon the totality of the circumstances developed at trial. The defendants have not cited a single case where summary judgment was upheld on the basis of consent to a search. The lack of such cases is not surprising in light of the First Circuit holding in Buenrostro v. Collazo, 973 F.2d 39, 43 (1st Cir. 1992):

> The defendants contend that they entered the house with plaintiff's consent, a datum, which, if true, would obviate the need for a warrant. Plaintiff, however, vehemently denies that he consented to the intrusion. At the summary judgment stage, therefore, the district court could not resolve the issue against him.

In this case Scott not only "vehemently denies that he consented to the intrusion," he offers ample evidence from which a jury could conclude that he merely acquiesced to an order from his superior. The cases cited by defendants to support the claim that Scott consented to the search do not provide a basis for determining this issue upon a motion for summary judgment because the cases involve an appellate court declining to overturn a trial court's determination of consent based on the totality of the circumstances. The standard applied in those cases was not the standard for summary judgment, it was a determination that the trial court's finding of consent was

not erroneous as a matter of law.

The plaintiff's burden at this point is not to demonstrate that his view of the issue is the most convincing version, only that when "the most favorable alternative inferences ... [are] drawn in his behalf" a reasonable jury could return a verdict in his favor. Ross v. Communications Satellite Corp., 759 F.2d at 364. In this case, the disputed facts and the agreed upon facts raise an issue as to whether Scott gave some form of implied consent to the search, or whether Scott merely acquiesced to his superior's order that he participate in the search. The issue of voluntary consent to the search cannot be resolved until the totality of the circumstances surrounding the alleged consent are developed at trial, and after there has been an opportunity to assess the credibility of those who participated in, or witnessed, the decision that Scott would be a member of the search and arrest team.

The District Court's resolution of the issue of Scott's voluntary consent on a motion for summary judgment ignores the warning of Schneckloth v. Bustamonte, 412 U.S. at 229:

> The problem of reconciling the recognized legitimacy of consent searches with the requirement that they be free from any aspect of official coercion cannot be resolved by any infallible touchstone. To approve such searches without the most careful scrutiny would sanction the possibility of official coercion.

In this case there are allegations and proof of official coercion warranting the "most careful scrutiny" which is possible only at a full trial of the issue.

D. THE DISTRICT COURT ERRED IN RULING DEFENDANTS ARE ENTITLED TO QUALIFIED AND SOVEREIGN IMMUNITY ON THE SEARCH CLAIMS

The District Court also dismissed the federal and state law search claims finding that the defendants were entitled to qualified immunity and sovereign immunity, which for purposes of the state law claim, which the court equated to qualified immunity. These findings were in error. The Fourth Circuit has recognized that "an official may be entitled to immunity from suit even where he has violated a plaintiff's rights - if they were not then 'clearly established' or if a 'reasonable person' in the official's position could have failed to appreciate that his conduct would violate them. Collinson v. Gott, 895 F.2d 994, 998 (4th Cir. 1990).

The defendants are not entitled to qualified or sovereign immunity because the law clearly established the requirements for voluntary consent to enter a citizen's home, and the defendants could not reasonably ignore that law and coerce Scott into participating in the search. Qualified immunity is not recognized when the defendant "violates clearly established ... Constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

1. The law clearly establishes the right to be free of warrantless searches and the right to give or withhold consent to search free from coercion or duress:

In Anderson v. Creighton, 483 U.S. 635 (1987) the Court cautioned against allowing plaintiffs to allege violations of "extremely abstract rights." The Court, however, continued: "this is not to say that an official

action is protected by qualified immunity unless the very action in question has previously been held unlawful." Id. at 639. The Anderson Court referred to Mitchell v. Forsyth, 472 U.S. 511, 535 n.12 (1985) which stated: "We do not intend to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances." The Fourth Circuit followed this approach in Tarantino v. Baker, 825 F.2d 772, 775 (4th Cir. 1987) where the court stated: "some actions by a police officer must be held to violate 'clearly settled' fourth amendment law even if no other reported case involves identical circumstances." See also Hobson v. Wilson, 737 F.2d 1, 26 (D.C. Cir. 1984) (requiring a prior ruling on identical facts "would turn qualified immunity into absolute immunity in any new fact situation").

This case involves a warrantless entry of a dwelling, perhaps the most clearly established aspect of Fourth Amendment law. "Warrantless searches or seizures occurring within a person's home are 'presumptively unreasonable' - a postulate which was indelibly etched in jurisprudential granite at the time of [plaintiff's] arrest." Buenrostro v. Collazo, 973 F.2d 39, 43 (1st Cir. 1992). The law governing consent searches is similarly etched in jurisprudential granite and the law is clear that police may not coerce consent from a homeowner. Bumper v. North Carolina, 391 U.S. at 550 n.14, recognized that:

> orderly submission to law-enforcement officers who, in effect, represented to the defendant that they had the authority to enter and search the house, against his will if necessary, was not such consent as constituted an understanding, intentional and voluntary waiver by the defendant of his fundamental rights under the Fourth

Amendment to the Constitution.

In language particularly relevant to this case, United States v. Shepherd, 714 F.2d

316, 318 n.2 (4th Cir. 1983) recognized that:

> Obeying a polite request issued by someone **obviously in authority and capable of enforcing the request** does not amount to 'consent' to the request. Citizens may obey police commands, even those put in the form of polite requests (e.g., 'please raise your hands above your head'; 'please give me your keys'), without any derivation from such non-volitional acts of a conclusion that they have waived their constitutional rights. (emphasis added).

See also Bustamonte v. Schneckloth, 448 F.2d 699, 701 (9th Cir. 1971) ("under many circumstances a reasonable person might read an officer's 'May I' as the courteous expression of a demand backed by force of law").

Defendants attach undue significance to the fact that Scott was not in custody at the time of the search, was not the target of the search, nor was there any explicit threat directed at Scott. But in Bumper v. North Carolina, 391 U.S. at 547 n.8, the Supreme Court found that consent to search was invalid even though the "consenting" homeowner was not in custody, not the target of the search, and testified:

> Nobody threatened me with anything. Nobody told me they were going to hurt me if I didn't let them search my house.

> Nobody told me they would give me any money if I would let them search. I let them search, and it was all my own free will. Nobody forced me at all.

Scott's right to make a voluntary choice free from any coercion was clearly established law at the time that Miller and Hosick ordered Scott to provide the police with access to his home. The District Court assumed that as an experienced police officer "Scott was knowledgeable in the law of search and seizure and knew that a warrantless search without consent was invalid." (JA 835). That same assumption must be applied to Scott's superiors who were fully aware that they could have removed any ambiguity surrounding Scott's consent by requesting explicit consent and by following department policy which called for the execution of a written consent form.

2. Reasonable police officers are aware of the law governing warrantless searches and the law governing consensual searches:

When the constitutional right violated was "clearly established," the "court can then presume that the defendant knew, or should have known, that his conduct was beyond pale." Buenrostro v. Collazo, 973 F.2d at 42. This presumption alone is grounds for denying defendants' motion for summary judgment. Qualified immunity is inappropriate in this case because reasonable police officers must be aware of the law of consensual searches as established by Bumper v. North Carolina and Schneckloth v. Bustamonte. The defendants extravagantly claim that qualified immunity provides police "with a margin for error when they navigate uncharted areas at the margins of constitutional criminal law." (JA 833). The legal requirements for obtaining voluntary consent to enter a citizen's home are not uncharted areas at the margins of

constitutional law. Reasonable police officers know that consent cannot be based on coercive commands to open the house to the police.

There also is no validity to defendants' claim that "the public would be ill-served if courts force police into paralyzing indecision." (JA 833). In this case as in Moore v. Marketplace Restaurant, Inc., 754 F.2d 1336, 1357 (7th Cir. 1985), the police were investigating "but a routine misdemeanor, so they could not have thought they must strike swiftly to protect the public safety." The courts have not forced paralyzing indecision on the police. In fact, the courts have clearly stated that indecision and ambiguity can be eliminated if the police obtain explicit consent and if the police refrain from telling a person: "I'm ordering you" to provide access to your home, "don't let him out of your sight until you search," and "we've got to look in the house." If Miller and Hosick reasonably believed that Scott had consented to the search, there would have been no reason for Miller to appoint a superior officer (Hosick) to take control of the search team and order Hosick "not [to] let Scott out of your sight until you search." These are not the actions of a person who believes he has obtained free and voluntary consent from Scott.

No reasonable police officer could believe that he was free to order Scott to participate in the search, assign two superior officers to keep Scott within sight at all times, ignore Scott's protests, announce that "we have to go in the house," and then claim that Scott's physical act of producing the key to the house amounted to voluntary consent negating all prior assertions of authority to search. If Miller and Hosick were in doubt as to Scott's consent and the effect of their orders, they could have requested that Scott execute a voluntary consent to search form. "An officer cannot invoke qualified immunity where he 'did not avail himself of readily available information that would have clarified matters....'" Goodwin v. Metts, 885

F.2d 157, 164 (4th Cir. 1989) (quoting Sevigny v. Dicksey, 846 F.2d 953, 957-58 (4th Cir. 1989)). In words particularly applicable to Miller's and Hosick's actions, Sevigny v. Dicksey, Id. at 958 noted that "in his impatience and irritation with [claimant, the officer] simply did not bother to do what any police officer acting reasonably in the circumstances would have done to clarify the factual situation." This is not a case where the Court need be wary of second guessing the judgment of a police officer who faced an unanticipated and rapidly escalating situation fraught with potential danger to the officer. As Justice Marshall noted in Schneckloth:

> none of the exceptions relating to the overriding needs of law enforcement are applicable when a search is justified solely by consent. ... [C]onsent searches are permitted, not because such an exception to the requirements of probable cause and warrant is essential to proper law enforcement, but because we permit our citizens to choose whether or not they wish to exercise their constitutional rights. Schneckloth v. Bustamonte, 412 U.S. at 282 (Marshall, J., dissenting).

Whatever discretion must be granted to a patrolman facing an armed and dangerous criminal, there is no need to sanction such discretion when exercised by police supervisors who executed a deliberate and protracted pattern of intruding upon Scott's rights.

Contrary to the defendants' assertion that police officials "must quickly choose a course of reasonable conduct, and then act on it," (JA 677), there was nothing

quick nor reasonable about the defendants' conduct[3]. The lack of a good faith mistake, and in fact the defendant's bad faith intent or reckless disregard for plaintiffs' Fourth Amendment rights is apparent from the totality of the circumstances evolving over a protracted time period and culminating in the remarkable manner in which the police obtained and executed the arrest warrant which formed the basis for the search of Scott's house. Although the District Court refused to consider the defendant's subjective bad faith, the Court agreed that the known facts must be filtered through how a reasonable officer would perceive the situation in light of those facts. Leaving aside the question of the defendants' subjective intent, their perception of whether Scott gave voluntary consent is effected by their knowledge of the facts leading up to the search of Scott's home.

The search of Scott's home was based on an arrest warrant for Amato, which was issued for criminal trespass, a misdemeanor in Va code § 18.2-119. Virginia law expresses a preference for the issuance of a summons in place of an arrest warrant in misdemeanor cases, and in fact, this is the Departmental policy of the defendants and

---

[3]viz; (3/22/92), Amato and Benson go to Acola's (JA 1317-1318); 3/24/92 Acola files B&E report (JA 1341); 3/31/92 Hosick assigned to investigation (JA 1366); 4/7/92 Hosick consults with C/A Morrissey who refused to prosecute (JA 1321-1322); 4/9/92 Hosick advised Benson, Scott and Acola that no charges to be filed (JA 1322); 4/10/92 Hosick consults with C/A Morrissey who, again, refused to prosecute (JA 1322); 4/10/92 11:00 A.M., Shannon issues warrant (JA 619); 4/15/92 Hosick meets with Overstreet, who tells Hosick "Acola did not tell Salerno to leave his presents [sic] (JA 1323); 4/16/92 Hosick meets with Peele (Gooch), Miller, regarding Parcell conversation, then goes on search "mission" to Chesterfield (JA 1323).

the practice followed by Virginia magistrates. The defendants initially presented their evidence against Amato, to Joseph Morrissey, Commonwealth Attorney of the City of Richmond, who twice declined to bring charges for either burglary or trespass. (4/7/92, JA 1321-1322; 4/10/92, 1322). The defendants, immediately after the Commonwealth's Attorney's adverse determination, sought the issuance of an arrest warrant before several magistrates who refused to issue the warrant. (JA 1362-1363). Finally, the defendants' "magistrate shopping" located a magistrate willing to issue this unusual arrest warrant (JA 1322). When the defendants enlisted the aid of a Chesterfield police officer to execute the arrest warrant, the officer "laughed" at the prospect of executing an arrest warrant for simple trespass. (JA 1352). The defendants' disregard for Virginia policy and practice evidences the unreasonable manner in which they obtained entry into Scott's home.

The defendants' pattern of conduct was not a reasonable mistake as to uncertain law, it was a conscious decision, or at a minimum, what any reasonable officer would recognize as a willingness to search Scott's house without following the law or standard departmental policy. When knowledgeable police officials like the defendants fail to follow standard procedures for obtaining voluntary consent to search, the inference arises (undeniably for purposes of summary judgment) that they sought to preclude Scott from making an informed decision as to whether he would or would not consent to a search of his home. See Pembaur v. Cincinnati, 475 U.S. 469 (1986) (relevance of police deviation from standard practices in serving capiases); Moore v. Marketplace Restaurant Inc., 754 F.2d at 1349 (summary judgment for defendants reversed, "the procedures followed by the sheriff's department in situations similar to the present one ... require further inquiry").

In this case, as in Unwin v. Campbell, 863 F.2d 124, 136 (1st Cir. 1988) "it is a question of fact whether the ... defendants acted with 'objective legal reasonableness,' given all the circumstances. Answers to these fact-specific questions, which are essential to the qualified immunity inquiry, cannot be resolved in this case on summary judgment." Accepting the plaintiffs' facts as true and drawing all favorable inferences from those facts, the plaintiffs have established that a warrantless search of their residence was, at most, acquiesced in by Scott only after orders from two superior officers. On these facts, the District Court erred in granting summary judgment for the defendants. The plaintiffs are entitled to litigate the reasonableness of the search at a full trial before a jury.

E. THE DISTRICT COURT ERRED IN FINDING THAT DEFENDANTS WERE NOT LIABLE UNDER §1983 FOR THE UNREASONABLE SEIZURE OF AMATO BASED UPON THE LACK OF PROBABLE CAUSE, MISREPRESENTATION, AND WITHHOLDING OF MATERIAL INFORMATION

Two issues are pertinent under this assignment of error - the arrest of Amato on the trespass warrant and his arrest on the extortion warrant. The trial court erred on both issues. These errors are discussed seriatim below.

1. Arrest on the trespass warrant: After acknowledging that an arrest warrant does not operate as an absolute shield to liability for unlawful arrest, the District Court summarized its holding as follows:

> At most, Hosick neglected to provide information which might or might not have affected the decision to issue the warrant during an informal conversation with a magistrate who declined to issue the warrant Hosick had requested.

> Indeed, it was Acola's conduct, not Hosick's, which produced the trespass charge. There is no evidence that Acola was acting at Hosick's behest. Acola tried unsuccessfully to secure a warrant without any involvement from Hosick. Acola continued to press the matter with the Commonwealth's Attorney and with Hosick. The prime actor here was Acola. That is not changed merely because Hosick reported to Acola the magistrate's observation about what would prompt him to issue an warrant for trespass. Hosick's role and conduct concerning the issuance of the warrant is insufficient to create liability in this case. (JA 862).

In order for the trial court to conclude as it did, the trial court ignored facts properly pled by plaintiffs and other facts submitted through depositions and affidavits. Further, the court resolved most if not all issues of disputed testimony in favor of defendants. In short, the court usurped the role of the jury and failed to construe facts in favor of the party opposing summary judgment. The District Court's conclusion that "the prime actor here was Acola," is a disingenuous conclusion in light of the facts and the chronology of events leading up to the trespass warrant.

The "prime actor" throughout this involved scenario was Hosick who, with the other defendants, concocted this elaborate scheme to get at Scott and Amato because they were believed to be spearheading a federal investigation of police corruption in Richmond. See ACLU of Maryland v. Wicomio County, 999 F.2d 780, 785 (4th Cir. 1993) ("retaliation by a public official for the exercise of a constitutional right is actionable under 42 U.S.C. §1983, even if the act, when taken for different reasons, would have been proper"). It was Hosick who investigated the

alleged break-in, discussed the charge with the Richmond Commonwealth Attorney who refused twice to prosecute on either burglary or trespass, and attempted to obtain an arrest warrant from at least two, possibly three magistrates. It was Hosick who refused to accept these officials' conclusion that there was no basis for arresting Amato. It was Hosick who insisted on being told what crucial facts would change the mind of a magistrate reluctant to issue an arrest warrant. It was Hosick who informed Acola of these necessary facts, introduced Acola to the magistrate, withheld information from the magistrate, and then executed the arrest warrant. Under the totality of the circumstances, Acola was merely a witting or unwitting pawn utilized by Hosick, who was the true moving force in the efforts to deceive a magistrate into issuing an arrest warrant. Although Acola had an independent right to file a complaint with the magistrate, "whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities." Skinner v. Railway Labor Executives' Assoc., 489 U.S. 602, 614 (1989).

When Hosick is seen as the moving party for the arrest warrant the law is clear that "if police officers have been instrumental in the plaintiff's continued confinement or prosecution, they cannot escape liability by pointing to the decisions of prosecutors or grand jurors or magistrates to confine or prosecute him. They cannot hide behind the officials whom they have defrauded." Jones v. City of Chicago, 856 F.2d 985, 944 (7th Cir. 1988). See also Goodwin v. Metts, 885 F.2d 157, 162 (4th Cir. 1989) (police cannot hide behind the conduct or decisions of others if they "deliberately supplied misleading information that influenced the decision"). The Supreme Court has stated that "a man is responsible for the natural

consequences of his actions," Monroe v. Pape, 365 U.S. 167, 187 (1961), and taking the facts and all inferences in the light most favoring the plaintiffs, it is clear that Hosick was the "prime actor" who obtained the arrest warrant for Amato. At a minimum, a reasonable jury could so find. The District Court overstepped proper bounds when it concluded that "there is no evidence that Acola was acting at Hosick's behest." (JA 862). As in DeLoach v. Bevers, 922 F.2d 618, 621 (10th Cir. 1990) "there was evidence from which the jury could believe that [the officer] manipulated the process" and "worked to cause" the plaintiff's arrest.

It is also clear that Hosick lacked probable cause and knowingly provided false information and omitted relevant exculpatory evidence when obtaining the arrest warrant for trespass, which is a specific intent crime in Virginia. VA code §18.2-119. Amato had entered the premises under a bona fide claim of right which, under Virginia criminal law, negated intent. Reed v. Commonwealth, 6 Va. App. 65, 366 S.E.2d 274 (1988). Hosick knew there was no specific intent to trespass because Amato had called the Richmond City Police to meet him at the premises, Amato claimed the right of entry under the lease, and counsel (Todd Benson) advised the police of Amato's right to enter. See People v. Quarles, 88 Ill. App.3d 340, 410 N.E.2d 497 (1980) (when police were informed by landlord that defendant lived in the apartment, they should have released him since they no longer had probable cause to believe that defendant had committed the offense of attempted burglary). In addition, the police were advised that Acola renounced in open court his claim to the top floors of the premises and had signed over all of his other rights in the lease several days prior to the alleged trespass. Thus Acola did not have possession on the date Amato entered.

With knowledge of the above facts, Hosick initially characterized the trespass charge as "unfounded." The Commonwealth Attorney refused to prosecute any charges and at least two magistrates refused to issue an arrest warrant. Under normal circumstances the investigation would have closed at this point. But because of the defendants' obsession with a possible federal investigation of police corruption in Richmond, Hosick continued to "shop" for a magistrate who would issue an arrest warrant and thus provide leverage against Amato and Scott. Hosick finally found a magistrate willing to issue a warrant if Acola would state certain crucial facts. Hosick advised Acola what facts he would have to tell the magistrate, chauffeured Acola to the magistrate's office, and then stepped aside discreetly while Acola regurgitated the specific words coached by Hosick.

At this point Hosick could not engage in a charade of stepping aside and thereby ignore his obligation to insure that all pertinent facts were presented to the magistrate. One pertinent fact was that Acola remembered prohibiting Amato's entry of the premises only after prompting from Hosick. The facts suggest that Hosick deliberately coached Acola to fabricate this crucial information, but at a minimum, Hosick acted recklessly in withholding from the magistrate the circumstances surrounding Acola's "recovered memory" of his barring Amato's future entry. "A reckless disregard for the truth exists when 'the affiant "in fact entertained serious doubts as to the truth of his" allegations, ... [and] a factfinder may infer reckless disregard from circumstances evincing "obvious reasons to doubt the veracity" of the allegations.'" DeLoach v. Beavers, 922 F.2d at 622 (quoting United States v. Williams, 737 F.2d 594, 602 (7th Cir. 1984)). Acola's sudden "recovered memory" of an order not to enter the premises raised serious questions about his veracity and consistency in recounting the relevant facts. Confronted with a similar situation in Stewart v. Donges,

915 F.2d 572, 582 n.13 (10th Cir. 1990), the Court held that failure to disclose in an affidavit that the main complainant had recanted his testimony "would be a reckless omission of a material fact in violation of plaintiff's clearly established rights because the affidavit would not support probable cause if it were modified so as to include that exculpatory evidence."

Although the recent case of Kyles v. Whitley, 63 U.S.L.W. 4303 (1995) (1995 U.S. Lexis 2845, *3; 63 U.S.L.W. 4303, p. 4, 2(b)) addressed discovery issues, the Supreme Court devoted unusual attention to the facts of the case involving police reliance on an informant who had a stake in the case and may have been "setting up" the defendant. The Court expressed concern that use of this questionable informant displayed "a remarkably uncritical attitude on the part of the police," and raised questions about "the thoroughness and even the good faith of the investigation...." Id. at 2(b).

In addition to the deliberate indifference and reckless disregard for the falsity of Acola's statements, Hosick failed to advise the magistrate of significant exculpatory evidence. This court has rejected the argument that a police officer has no obligation to disclose exculpatory information. "A police officer who withholds exculpatory information from the prosecutor can be liable under both §1983 and the state common law." Goodwin v. Metts, 885 F.2d at 161; DeLoach v. Beavers, 922 F.2d at 621 (officer "cannot hide behind the decisions of others involved in [plaintiff's] arrest and prosecution if she deliberately conceals and mischaracterizes exculpatory evidence"). The issuance of an arrest warrant will not shield a police officer who applied for the warrant from liability for false arrest if "a reasonably well-trained officer in [his] position would have known that his affidavit failed to establish probable cause and that he should not have

applied for the warrant." Malley v. Briggs, 475 U.S. at 345.

Hosick withheld the crucial information that the lease gave Amato the right to enter the premises, and he withheld information that Acola had relinquished and conveyed all rights in the premises. An officer who obtains an arrest warrant is insulated from liability "only where all the facts are presented" to a magistrate or other independent intermediary. Hand v. Gary, 838 F.2d 1420, 1428 (5th Cir. 1988) ("any misdirection of the magistrate or the grand jury by omission or commission perpetuates the taint of the original official behavior"). Although not all evidence known to an officer need be included in the affidavit,

> in the case of omitted evidence it is not enough to ask simply whether the truthful statements included in the affidavit are by themselves sufficient to support a probable cause finding; the court also must ask if inclusion of the omitted material would negate probable cause. DeLoach v. Beavers, 922 F.2d at 623.

Recklessness may be inferred from omission of facts which are "clearly critical" to a finding of probable cause. Hale v. Fish, 899 F.2d 390, 400 (5th Cir. 1990); United States v. Reivich, 793 F.2d 957, 961 (8th Cir. 1986).

Hosick's omission of exculpatory evidence coupled with repeated admissions that he knew Amato "didn't do anything wrong," establish that the police, independently, knew that there was not probable cause to arrest Amato for trespass. See DeLoach v. Beavers, 922 F.2d at 621 (officer violated plaintiff's Fourth Amendment rights "by causing her to be arrested pursuant to an intentionally false and misleading affidavit"). Hosick's disregard for

probable cause and his true motivation for arresting Amato are disclosed in his statements to Amato:

"During Det. Sgt. Hosick's trips back and forth across the hall, I specifically recall him stating, 'Tony, we know you didn't do anything wrong, but we need to get Mike (Scott) and know you have the goods on him. Help us and we'll help you out of this mess.' I told Sgt. Hosick Mike was a good cop, just as I had indicated during my interrogation, and that I didn't know anything bad about Mike." (JA 1360). "I recall the last thing Sgt. Hosick said to me before I was taken to ID for fingerprinting and photographing was; 'if you would have come to me, none of this would have happened'." (JA 1360).

As noted by the Seventh Circuit in Olsen v. Tyler, 771 F.2d 277, 281 (7th Cir. 1985), "[a]n officer's conduct in preparing a warrant affidavit that contains only inaccurate statements that are untruthful as that term is defined in Franks violates the arrestee's fourth amendment rights. In such a case, a reasonably well-trained police officer would have known that the arrest was illegal."

In this case the alleged trespass involved a landlord/tenant dispute which several magistrates and the Commonwealth's Attorney informed Hosick was a civil matter not appropriate for issuance of an arrest warrant. The facts here parallel the situation in Moore v. Marketplace Restaurant Inc., 754 F.2d at 1345 which the court characterized "as a dispute over whether a breach of contract occurred between the parties...." Just as was true in Moore, "this entire episode may have been avoided if the officer who received the original complaint and the arresting officers had used reasonable judgment and conducted a proper investigation...." Id. at 1345. In

scathing language, the Seventh Circuit continued:

> there is no law against using common sense-;" indeed, the use of common sense is a prerequisite for police officers in developing their investigation in order to effectuate a valid arrest. In this land of freedom and liberty, with all of its concomitant constitutional rights and protections, if we wish to have our citizen population continue to respect the authority of police personnel performing their duties in a lawful manner, it is incumbent upon law enforcement officials to make a thorough investigation and exercise reasonable judgment before invoking the awesome power of arrest and detention. Id. at 1346.

In Moore, the Seventh Circuit reversed the summary judgment in favor of the police and concluded that "under the circumstances of this case it is proper for the jury to consider all the evidence, including questions regarding the sufficiency of the deputies' investigation ..., in determining whether there was enough evidence to establish probable cause to arrest...." Id. at 1347.

Under the facts of this case the defendants are not entitled to qualified immunity because they unreasonably disregarded clearly established law, and in the words of the Seventh Circuit, they failed to exercise simple common sense. No police officer would believe that it was objectively reasonable go to the extra-ordinary lengths pursued by Hosick in what was allegedly a misdemeanor trespass. "The amount of information that prudent police will collect before deciding to make a search or an arrest, and hence the amount of probable cause they will have, is a function of the gravity of the crime, and especially the danger of its imminent repetition." Llaguno v. Mingey,

763 F.2d 1560, 1566-67 (7th Cir. 1985). If Hosick was acting in objective good faith, he would have submitted all relevant facts to the magistrate and would have been prepared to respect whatever conclusion was reached by a magistrate given all pertinent facts of the case. Instead, Hosick distorted the information presented to the magistrate even though there were no "practical exigencies that prevented fuller investigation of the facts before the arrest was made." Sevigny v. Dicksey, 846 F.2d at 957.

On summary judgment, the District Court was required to review the facts in a light most favorable to the losing party, plaintiffs. It did not. On review, this Court also must consider the evidence in a light most favorable to plaintiffs below and determine whether there were any genuine issue of material fact remaining in the case. Viewing the facts most favorably to plaintiffs, it is clear that Hosick knew Amato had a bona fide right to enter the property allegedly trespassed upon. Hosick also knew that Acola had sold his lease to another entity and thus had no rights to the property. Finally, Hosick admitted that he knew Amato did nothing wrong but was using Amato to get at Scott. As this court previously recognized, "an officer cannot invoke qualified immunity where he 'did not avail himself of readily available information that would have clarified matters to the point that [the criminal charge] would have been flatly ruled out as factually unsupportable." Goodwin v. Metts, at 164 (quoting Sevigny v. Dicksey, 846 F.2d at 957-58). Viewing the facts most favorably to plaintiffs, this case warrants the disposition utilized in Be Vier v. Hucal, 806 F.2d 123, 127 (7th Cir. Ill. 1986) "Because the arrest could have been avoided if the arresting officer had conducted a proper investigation, summary judgment was improper." See also DeLoach v. Beavers, 922 F.2d at 623 ("the alleged misstatements and omissions in this case clearly were material enough that the district court was justified in

submitting the question of probable cause to the jury").

2. Arrest on extortion charges: According to the District Court, "Amato made the same Fourth Amendment wrongful arrest argument as to the arrest on the extortion indictment that he made as to the trespass. The law governing this claim is the same as the law governing the trespass claim". (JA 866). Just as the law prohibits Hosick from lying to or misleading a magistrate when obtaining the arrest warrant, the law forbids Shuman's lying or misleading of the grand jury when testifying on the extortion charge. Goodwin v. Metts, 885 F.2d at 162 (police cannot hide behind the conduct or decisions of others if they "deliberately supplied misleading information"); Jones v. Chicago, 856 F.2d at 944 (police cannot escape liability by hiding behind the decisions of prosecutors or grand jurors whom they have defrauded).

According to Parcell, the critical piece of evidence suggesting that an indictment was warranted was a statement Shuman attributed to Fred Bilter - that Bilter saw "fear" in Acola's eyes. However, this "critical" piece of evidence never existed. Bilter never told Shuman that he saw "fear" in Acola's eyes or that Acola was scared. Rather, Bilter told Shuman that Acola was "mad", not fearful.

Bilter maintained that Shuman "had to understand what I said. ..." (JA 1304), Opinion of District Court at 60, (JA 869). See Bilter Affidavit, (JA-453-460). Not only did Bilter swear that Shuman's misrepresentation had to be intentional, there was further evidence that Shuman's reputation for truth and veracity was not very good. This later testimony came from a fellow police officer: "I've heard his reputation as far as truthfulness and veracity is not the best." (JA 1293).

Shuman, nevertheless, went before a Richmond Circuit Court grand jury and lied about Bilter's statement. (Compare Shuman Dep., 9/15/94, p. JA 1166-1168 with preceding Bilter affidavit.). Shuman failed to tell the grand jury that it took over five months for Acola to have another episode of "recovered memory," making any claim about a threat from Amato which Acola previously denied, and Shuman also failed to tell the grand jury that the alleged threat involved the inherently incredible use of a salami to inflict injury. Shuman also cannot recall having told the grand jury that Officer Overstreet asked Acola if he had felt satisfied at the time of the incident, and that Acola responded that he was satisfied and was not threatened. Further, the grand jury was given no evidence that Amato took or demanded money or property - a necessary element of an extortion charge. See Va. code §18.2-59. Shuman was the sole witness before the grand jury and based upon his testimony, the grand jury indicted Amato on a felony charge of extortion.

As a reasonable police officer Shuman could not have understood Bilter's comments to be what Shuman represented to the Grand Jury. Every witness present during the alleged extortion incident (including Acola at the time) stated that Acola was not threatened. Shuman's intentional and reckless distortion of this crucial fact is all the more apparent in light of his poor reputation for truth and veracity. The District Court finding that Shuman reasonably believed his actions to be lawful and therefore immune from liability flies in the face of the evidence presented to the trial court. The District Court granted summary judgment despite the following facts: (1.) Four Richmond City Police Officers observed the so-called extortion and Acola himself denied that any threats were made. (2.) Acola said he was not frightened. (3.) Amato never requested any money from Acola. (4.) No money

changed hands. (5.) Amato stated under oath he never threatened Acola nor asked for money. (6.) Bilter stated under oath that Amato never threatened Acola or ever asked for money. (7.) The investigating police officers admitted knowing Amato did nothing wrong. (8.) Shuman had a bad reputation for truthfulness.

In contrast to the above facts disproving any reasonable belief of extortion, nothing supported Shuman's grand jury testimony except his affidavit. Everything pointed to him as a perjurer,[4] thus presenting a factual issue of credibility that could be resolved only at trial. Did Shuman intentionally lie to the grand jury? The trial court resolved this factual dispute in favor of the defendants, but the law requires that on a motion for summary judgment this dispute be decided in favor of plaintiffs. When the facts are viewed in favor of the plaintiffs, it is clear that Shuman had no evidence of a threat; no evidence of a demand for money; and no evidence that Acola ever surrendered any money. In contrast to Shuman's version of the facts, every witness present during the alleged extortion (including Acola at the time) stated that Acola was not threatened. Yet Shuman ignored the exculpatory evidence, lied about the inculpatory evidence, and obtained an extortion indictment. The question of Shuman's perjury was a disputed fact appropriate for resolution by a jury. Summary judgment was inappropriate.

Throughout its opinion, the District Court failed to view the facts and inferences in the light most favorable to

---

[4]Compare Shuman's affidavit, JA 240 para.7 to JA 445; compare JA 242 para.12 to JA 455, 456 para.9(c), and 1385 & 1391. Compare JA 1293-1296 to 1131; compare JA 1172 to 1298-1300.

the plaintiffs. A striking example appears on pages 59 and 60 of the District Court's opinion (JA 868-869). In considering Shuman's statements after a 1994 expungement hearing, the court stated that Shuman's statement to Bilter that "you told me that you seen [sic] fear in his eyes" was "strong evidence" that Shuman remembered the comment as he represented it to the prosecutor and Grand Jury. Yet when considering Shuman's statement, made at the same time, that Shuman was going to "get" Amato (JA 457; 1304), that Amato and Scott were "dirty," and "scumbags (JA 1385)," the Court concluded that these statements "are too far removed from the incidents in question to be probative of any animus at the time of the incidents involved in this action." Fairness dictates that if Shuman's self-serving statements were indicative of his good faith, then statements of his bad faith are equally relevant. Perhaps, the distinction between statements that are "strong evidence" and those statements that are "not probative" is a distinction that could be best drawn by a jury after hearing all the evidence and assessing the credibility of the witnesses. But on a motion for summary judgment, the court may not draw such distinctions and accord weight to what it deems the most convincing inference. The District Court overstepped proper bounds and failed to view the motion for summary judgment in the light most favorable to the plaintiffs.

F. THE DISMISSAL WITHOUT PREJUDICE OF THE PLAINTIFFS' STATE LAW CLAIMS SHOULD BE REVERSED:

In its order, the District Court dismissed without prejudice Amato's and Scott's state law claims for intentional infliction of emotional distress. The Court ruled that it would not exercise jurisdiction over these claims because it was dismissing the claims that were

based upon the existence of a federal question. In that the dismissal of the federal question claims should be reversed for the reasons set forth above, this Court should also reverse the dismissal of the state law claims and remand those claims for trial by jury.

CONCLUSION

When the plaintiffs are accorded their right to have all evidence and inferences viewed in a light most favorable to them, it is clear that they have established:

1. Scott's Fourth Amendment rights and rights under Va code §19.2-59 were violated by a coerced entry of his dwe lling.
2. Amato's Fourth Amendment rights and rights under Va. Code §19.2-59 were violated by the warrantless entry of his dwelling.
3. Amato's Fourth Amendment rights were violated by his illegal arrest and seizure on charges of trespass and extortion.
4. The defendants are not entitled to qualified immunity because they knowingly and recklessly disregarded clearly established law which prohibited their illegal activities.

Summary judgment is improper in this case because "there was evidence from which the jury could believe that

[the officers] manipulated the process" and "worked to cause" these violations of the plaintiffs' constitutional rights. DeLoach v. Bevers, 922 F.2d at 621.

WHEREFORE, Appellants Anthony M. Amato and A. Michael Scott, Sr., respectfully request that this Court REVERSE the judgment of the United States District Court for the Eastern District of Virginia, that all issues in this matter be REMANDED for trial, including all pendant state claims, and that all fees and costs of this Appeal be taxed against Appellees.

MICHAEL J. KELLY
The Boulders II - Suite 500
7400 Beaufont Springs Drive
Richmond, Virginia 23225-5519
(804) 330-0006

Attorney for Appellants

CERTIFICATE OF SERVICE

In accordance with Rule 25 of the Federal Rules of Appellate Procedure and Internal Operating Procedure 25.2 of the United States Court of Appeals for the Fourth Circuit, I hereby certify that:

On this 17th day of May 1995, I caused to have filed the required copies of the Brief of Appellants and Joint Appendix with the Office of the Clerk of the Court, and have caused to have hand delivered the required copies of the Brief for Appellants and Joint Index to:

William J. Hoppe, Esquire, Lead Counsel
Scott C. Oostdyk & Kenneth D. Crowder
City Attorney's Office
McGuire, Woods, Battle & Boothe
900 E. Broad Street Suite 300
901 E. Cary Street
Richmond, Virginia 23219-4030
Richmond, Virginia 23219

Michael HuYoung
S. Jane Chittom
2222 Monument Avenue
Shuford, Rubin & Gibney
Richmond, Virginia 23220
700 E. Main Street Suite 1250
Richmond, Virginia 23206

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

AFFIDAVIT OF SERVICE

----------x

ANTHONY M. AMATO and,
A. MICHAEL SCOTT, SR.,
Plaintiffs-Appellants,

Case No.: 95-1114

vs.

THE CITY OF RICHMOND, et. al.

----------x

COMMONWEALTH OF VIRGINIA }
} to wit:
CITY OF RICHMOND }

I, _____ being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by Michael J. Kelly, Attorney for Plaintiffs-Appellants.

That on this the 17th day of May, 1995, I served the within Brief of Appellants and the Joint Appendix in the above captioned matter upon:

City of Richmond
William J. Hoppe, Sr. Asst. City Attorney
900 East Main Street Suite 300
Richmond, Virginia

by delivering by hand, two copies of the Brief of Appellants and ___ copies of the Joint Appendix to

McGuire, Woods, Battle, & Boothe at the address hereinabove.

Unless otherwise noted, filing to the court has been perfected on the same date as above.

_____

SWORN to and subscribed
before me this ___ day of
May, 1995.

_____

_____
Notary Public
My Commission Expires:

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RECORD NO. 95-1114

ANTHONY M. AMATO,
A. MICHAEL SCOTT, SR.,

Plaintiffs-Appellants,

v.

CITY OF RICHMOND, W. R. SHUMAN,
ROBERT HOSICK, TERESA P. GOOCH,
LAUREL MILLER, PHILIP MANGANO,
MARTY M. TAPSCOTT

Defendants-Appellees

APPELLANTS' PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT RICHMOND (Hon. Robert E. Payne, J.)

Michael J. Kelly
Attorney at Law
The Boulders II - Suite 500
7400 Beaufont Springs Drive
Richmond, Virginia 23225-5519
(804) 330-0006

Counsel for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF COUNSEL 1

ARGUMENT 4

I. The Panel affirmed the District Court's erroneous determination that the plaintiffs/appellants bear the burden of proving the absence of voluntary consent to search 4

II. The Panel affirmed the District Court's resolution of a factual issue against appellants even though appellants opposing a motion for summary judgment were entitled to have all disputed facts resolved in their favor 9

CONCLUSION 15

TABLE OF AUTHORITIES

Amato v. City of Richmond, 875 F.Supp. 1124(E.D. Va. 1994).

Allen v. City of Portland, 1995 WL 747768 (9th Cir. 1995).

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

Boyd v. United States, 116 U.S. 616 (1886).

Crowder v. Sinyard, 884 F.2d 804 (5th Cir. 1989).

DeLoach v. Bevers, 922 F.2d 618 (10th Cir. 1990).

DePugh v. Smith, 880 F.Supp. 651 (ND Iowa 1995).

Goodwin v. Metts , 885 F.2d 157 (4th Cir. 1989)

Huotari v. Vanderport, 380 F. Supp. 645 (D. Minn. 1974).

Jones v. United States, 357 U.S. 493 (1958).

Karnes v. Skrutski, 62 F.3d 485 (3rd Cir 1995).

Katz v. United States, 389 U.S. 347 (1967).

Larez v. Holcomb, 16 F.3d 1513 (9th Cir. 1994).

Malley v. Briggs, 475 U.S. 335 (1986).

McGann v. Northeast Illinois Regional Commuter Railroad, 8 F.3d 1174 (7th Cir. 1992).

Moore v. Marketplace Restaurant Inc., 754 F.2d 1336 (7th Cir. 1985).

Peterson v. City of Plymouth, 60 F.3d 469 (8th Cir. 1995).

Reed v. Commonwealth, 6 Va. App. 65, 366 S.E.2d 274 (1988).

Ruggiero v. Krzeminski, 928 F.2d 558 (2nd Cir. 1991).

Schneckloth v. Bustamonte, 412 U.S. 218(1973).

Skinner v. Railway Labor Executives' Assoc., 489 U.S. 602 (1989)

Tarter v. Raybuck, 742 F.2d 977 (6th Cir. 1984).

U.S. v. Leon, 468 U.S. 897 (1984).

United States v. Morrow, 731 F.2d 233 (4th Cir. 1984).

STATEMENT OF COUNSEL

Counsel for the Appellants respectfully requests that this Court grant a rehearing and/or a rehearing en banc. The Panel opinion in Amato v. City of Richmond, No. 95-1114 (4th Cir. March 5, 1996), decided a question of first impression in this Circuit by issuing an unpublished per curiam opinion which conflicts with decisions of other Courts of Appeal. Furthermore, the Panel exceeded its proper powers by resolving a factual issue against appellants even though appellants opposing a motion for summary judgment were entitled to have all disputed facts resolved in their favor. Specifically, the District Court opinion affirmed by the Panel found that a private citizen, rather than a police officer, was responsible for obtaining an arrest warrant even though there were six failed attempts to obtain a warrant and the police officer ultimately counseled the citizen on how to obtain a warrant on the seventh attempt. The holding that the private citizen was not acting at the police officer's behest, conflicts with Skinner v. Railway Labor Executives' Assoc., 489 U.S. 602, 614 (1989) which recognized that "whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities," a factual question inappropriate for resolution on motion for summary judgment. In support of this request, this Petition asserts the following:

1. As the District Court noted, there is a conflict among the federal courts as to which party in a §1983 case bears the burden of proving allegedly consensual searches. The Second, Fifth and Ninth Circuits place the burden on the plaintiff to disprove a defendant's claim of consent to the search. See Ruggiero v. Krzeminski, 928 F.2d 558, 563 (2nd Cir. 1991); Crowder v. Sinyard, 884 F.2d 804, 824-26

(5th Cir. 1989); Larez v. Holcomb, 16 F.3d 1513, 1517 (9th Cir. 1994). The Third, Sixth, and Seventh Circuits, and U.S. District Courts in Minnesota and the Northern District of Iowa assign the burden of proof to defendants who claim that consent justified a warrantless search. See Karnes v. Skrutski, 62 F.3d 485, 495 (3rd Cir 1995); Tarter v. Raybuck, 742 F.2d.977, 980-01 (6th Cir. 1984); McGann v. Northeast Illinois Regional Commuter Railroad, 8 F.3d 1174 (7th Cir. 1992); Huotari v. Vanderport, 380 F. Supp. 645, 648 (D. Minn. 1974); DePugh v. Smith, 880 F.Supp. 651 (ND Iowa 1995).

The District Court opinion affirmed by the Panel assigned the burden of proof to the appellants by invoking a mechanical approach which assigned the burden to the moving party, i.e. the plaintiff in a §1983 case. This mechanical approach to allocating the burden of proof on consent searches ignores the important constitutional considerations that have guided the Supreme Court's decisions on consent searches. This important question of first impression should not be decided by an unpublished per curiam opinion which leaves standing the District Court's erroneous resolution of the issue.

2. The District Court opinion affirmed by the Panel conflicts with this Court's previous recognition in Goodwin v. Metts , 885 F.2d 157, 164 (4th Cir. 1989) that "an officer cannot invoke qualified immunity where he 'did not avail himself of readily available information that would have clarified matters to the point that [the criminal charge] would have been flatly ruled out as factually unsupportable." Prior to the issuance of the arrest warrant for appellant Amato there had been eight determinations that the matter involved a civil dispute, that the complaining witness had bargained away all his

possessory interests days before the incident, and that there was no probable cause for issuance of an arrest warrant. Nonetheless, a police officer counseled a private citizen as to how to obtain an arrest warrant from a Virginia Magistrate who had previously refused to issue the warrant. In reviewing a motion for summary judgment, the District Court overstepped proper bounds when it concluded that "there is no evidence that [the private citizen] was acting at [the police officer's] behest." The motion for summary judgment should have been denied because "there was evidence from which the jury could believe that [the officer] manipulated the process" and "worked to cause" the plaintiff's arrest. DeLoach v. Bevers, 922 F.2d 618, 621 (10th Cir. 1990).

ARGUMENT

I. THE PANEL AFFIRMED THE DISTRICT COURT'S ERRONEOUS DETERMINATION THAT THE PLAINTIFFS/APPELLANTS BEAR THE BURDEN OF PROVING THE ABSENCE OF VOLUNTARY CONSENT TO A SEARCH

The District Court applied an erroneous standard of review when it held that "the evaluation of the record on consent, for purposes of summary judgment, must be guided by the fact that the plaintiffs bear the burden of proof." (Amato v. City of Richmond, 875 F.Supp. 1124, 1134 (E.D. Va. 1994). The District Court justified its holding on grounds that the government bears the burden of proving consent in criminal cases because the government must prove its case beyond a reasonable doubt, but in the civil context, the plaintiff should be required to prove all elements of the claim including a lack of consent. According to the District Court, treating the issue of consent differently in criminal and civil cases is justified because of the parties' overall burden of proof on the case. The District Court's rather mechanical approach to allocating the burden of proof on consent searches ignores the important constitutional considerations that have guided the Supreme Court's decisions on consensual searches.

The standard for voluntary consent was established in Schneckloth v. Bustamonte, 412 U.S. 218, 223 (1973) where the Court cautioned against "mechanical" application of rules surrounding the voluntariness of consent. The Supreme Court made no reference to the government's overall burden of proof in a criminal case or

to a claimant's burden of proof in a civil case. In fact, Schneckloth v. Bustamonte was a habeas corpus case, and like the present §1983 suit, habeas corpus is a civil suit in which the petitioner, like these plaintiffs/appellants, begins with the burden of proof. Had the Supreme Court adopted the view espoused by the District Court, the Supreme Court would have placed the burden of proving involuntary consent on the habeas corpus petitioner. Instead the Supreme Court held that once the petitioner establishes that a warrantless search took place, and the government relies upon consent to justify the search, the government bears the burden of proving voluntary consent. The context in which the question of voluntary consent arose, whether civil or criminal, was not a relevant factor to the Supreme Court. See also Malley v. Briggs, 475 U.S. 335, 344 (1986) where the government asked the Supreme Court to lower the standard of U.S. v. Leon, 468 U.S. 897 (1984) in §1983 cases. The Court refused, stating "we hold that the same standard of objective reasonableness that we applied in the context of a suppression hearing in Leon, defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest."

Rather than create different constitutional standards for consent searches in a civil or criminal context, the Supreme Court sought guidance from its confession cases, and noted that "'voluntariness' has reflected an accommodation of the complex of values implicated in police questioning." Schneckloth v. Bustamonte, Id. at 224. The Court recognized that similar values were implicated in the Fourth Amendment context, specifically, "two competing concerns [which] must be accommodated in determining the meaning of a 'voluntary' consent - the legitimate need for such searches and the equally important requirement of assuring the

absence of coercion." Id. at 226. The burden of proving free and voluntary consent was then assigned to the government because "the requirement of a 'voluntary' consent reflects a fair accommodation of the constitutional requirements involved." Id. at 229.

The lower federal courts must accept this fair accommodation and follow a consistent approach to proving consent in both criminal and civil cases because the constitutional considerations do not change according to the identity of the moving party. The important constitutional consideration is the Supreme Court's recognition that warrantless searches are per se unreasonable, "subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967). These exceptions are "jealously and carefully drawn," Jones v. United States, 357 U.S. 493, 499 (1958), and "this is especially true when government authorities intrude into a person's dwelling." Huotari v. Vanderport, 380 F. Supp. at 648.

Decisions like Huotari accept Schneckloth's accommodation of constitutional principles and assign the government the burden of proving voluntary consent in §1983 cases because "the right of officers to thrust themselves into a home is ... a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance." Huotari v. Vanderport, 380 F. Supp. at 648. As Huotari does, the federal courts must look beyond the concerns of the parties in a particular case in order to give effect to society's interest in limiting warrantless searches. In both criminal and civil cases, the societal interest in prohibiting warrantless searches requires that the government prove the consenting party "freely and intelligently [gave her] unequivocal and specific consent to the search, uncontaminated by any duress or coercion, actual or

implied." United States v. Morrow, 731 F.2d 233, 236 (4th Cir. 1984).

In this case, the District Court assigned the burden of proof to the plaintiffs/appellants because the Court found decisions like Huotari and Tarter v. Raybuck, 742 F.2d 977 (6th Cir. 1984) to be "unpersuasive." The Tarter decision was deemed unpersuasive because it placed the burden of proof on the government by invoking "a presumption against the waiver of constitutional rights." Id. at 980. The District Court recognized that such a waiver theory was rejected by Schneckloth in favor of a totality of the circumstances test. Decisions like Tarter, however, are very persuasive attempts to be faithful to Schneckloth's accommodation of conflicting constitutional principles.

Schneckloth declined to hold the government to proving a knowing and intelligent waiver of Fourth Amendment rights because of the unique operation of the Fourth Amendment exclusionary rule in criminal cases. The Schneckloth Court noted that unlike the Sixth Amendment right to counsel, which requires a knowing and intelligent waiver, waiver of Fourth Amendment rights is affected by the exclusionary rule which excludes otherwise relevant evidence and thus defeats the truth-seeking function of adjudication. See Malley v. Briggs, 475 U.S. 335, 344 (1986) ("While we believe the exclusionary rule serves a necessary purpose, it obviously does so at a considerable cost to society as a whole, because it excludes evidence probative of guilt"). Because of concerns over the truth-defeating effects of the exclusionary rule, Schneckloth refused to impose on the prosecution the heavy burden of proving that there was a knowing and intelligent waiver of Fourth Amendment rights. Schneckloth nonetheless placed the burden of proving voluntary consent upon the government. Once

again, the Supreme Court resolved conflicting constitutional principles by accommodating the favored rule requiring a knowing and intelligent waiver of constitutional rights when balanced against the disfavored consequences of the Fourth Amendment exclusionary rule.

This delicate balance of conflicting Fourth Amendment principles is nullified in this case by the District Court's decision to place multiple burdens on §1983 plaintiffs. According to the District Court, the government is relieved of the need to prove waiver of a constitutional right, while at the same time, plaintiffs claiming that the government conducted an unreasonable search must prove a negative - the absence of voluntary consent. As Justice Marshall cautioned in Schneckloth "courts have traditionally been reluctant to require a party to prove negatives such as the lack of knowledge" or consent. Schneckloth v. Bustamonte, 412 U.S. at 286 (Marshall, J., dissenting).

The exclusionary rule is not applicable in §1983 litigation, thus there is no need to apply what Schneckloth, 412 U.S. at 245 conceded was a "diluted form of waiver." In Malley v. Briggs, 475 U.S. at 344 the Court noted that unlike the societal costs associated with the exclusionary rule

> a damages remedy ... imposes a cost directly on the officer responsible ..., without the side effect of hampering a criminal prosecution. Also, in the case of the §1983 action, the likelihood is obviously greater than at the suppression hearing that the remedy is benefiting the victim of police misconduct one would think most deserving of a remedy - the person who in fact has done no wrong, and has been arrested for

no reason, or a bad reason.

Unfettered by the need to adjust Fourth Amendment law to account for the exclusionary rule, Karnes v. Skrutski, 62 F.3d 485, 495 (3rd Cir 1995); Tarter v. Raybuck, 742 F.2d 977, 980-01 (6th Cir. 1984); McGann v. Northeast Illinois Regional Commuter Railroad, 8 F.3d 1174 (7th Cir. 1992); Huotari v. Vanderport, 380 F. Supp. 645, 648 (D. Minn. 1974); and DePugh v. Smith, 880 F.Supp. 651 (ND Iowa 1995), give appropriate effect to the general presumption against waiver of constitutional rights and represent the proper view of how to allocate the burden of proof in §1983 cases. First, the plaintiffs must initially prove that a warrantless search occurred and thus place themselves within the general rule that warrantless searches are per se unreasonable. Second, the burden of proving an exception to the general rule then rests upon the defendants who seek to justify conduct which is per se unreasonable. When government officials claim that they fall within a "jealously and carefully drawn" exception to the prohibition against warrantless searches, these government officials rightly bear the burden of proving the exceptional circumstances that justify their generally prohibited conduct. In placing the burden of proving consent on the government, Schneckloth v. Bustamonte, 412 U.S. at 228, invoked the "classic admonition" of Boyd v. United States, 116 U.S. 616, 635 (1886):

> constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy

encroachment thereon.

There remains only one concern unique to §1983 cases, and thus beyond the considerations resolved in Schneckloth. The Supreme Court has recognized the need to protect government officials from frivolous §1983 suits. However, this legitimate concern does not justify placing excessive procedural hurdles in the path of a §1983 plaintiff who has demonstrated the gravity of his claim by proving that a warrantless search occurred and that such warrantless searches are per se unreasonable. The present case is not the type of frivolous §1983 claim that troubles the courts or justifies summary judgment against the plaintiffs/appellants. This case does not involve some disgruntled prisoner who claims that his constitutional rights were violated by an unsatisfying luncheon menu at the prison. This case involves a decorated police officer who was not suspected of nor charged with any crime. His home was searched without a warrant, without probable cause, and in violation of police department policy requiring the execution of a written consent to search form, and requiring the reading of "The Police Officer Bill of Rights" before requesting permission to search an officer's home . Officer Scott has proven that he was the victim of a warrantless search of his home, and standing alone this states a §1983 claim worthy of careful scrutiny unless and until the government can prove that its warrantless entry was justified by some exception to the rule that warrantless searches are per se unreasonable. The Supreme Court's mandate to discourage warrantless searches dictates that those who conduct warrantless searches bear the burden of justifying their need to engage in such prohibited practices.

Appellants contend that the record in this case establishes that appellant Scott never gave voluntary

consent and thus the District Court's granting of the appellees' motion for summary judgment should be reversed. At a minimum, however, the case must be returned to the District Court with instructions to review the issue of voluntary consent by applying the correct legal standard which requires that the appellees bear the burden of proving voluntary consent.

II. THE PANEL AFFIRMED THE DISTRICT COURT'S RESOLUTION OF A FACTUAL ISSUE AGAINST APPELLANTS, EVEN THOUGH APPELLANTS OPPOSING A MOTION FOR SUMMARY JUDGMENT WERE ENTITLED TO HAVE ALL DISPUTED FACTS RESOLVED IN THEIR FAVOR

The party opposing a motion for summary judgment need "only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242 , 257 (1986). The Panel and the District Court ignored this point in holding that appellee Hosick was not responsible for obtaining the arrest warrant for appellant Amato.

The arrest warrant was based on an alleged trespass on the premises leased by Acola from appellants Amato and Scott. Amato entered the premises accompanied by his lawyer, Todd Benson, and Police Officer Arthur, who Amato requested to be present at the time of entry. When appellee Hosick investigated the alleged trespass he was told by Officer Arthur that this was a civil dispute, not a criminal matter, and that Virginia Magistrate Thomas had ruled that this was a civil dispute and that "no warrant was going to be obtained due to the lack of probable cause." Attorney Benson informed appellee Hosick of Virginia Code §18.2-119 and Reed v. Commonwealth, 6

Va. App. 65, 71, 366 S.E.2d 274 (1988) which establish that "one cannot be convicted of trespass when one enters or stays upon the land under a bona fide claim of right. ... A good faith belief that one has a right to be on the premises negates criminal intent." Additionally, Benson provided Hosick with the contract of sale for all of Acola's possessory rights and interests, for a substantial consideration, entered into five (5) days prior to the alleged trespass. Hosick knew, from his own superior knowledge, that Acola had no possessory interest, rights, or standing to bring the trespass charge. At this point appellee Hosick agreed that the alleged trespass charge was "unfounded," and closed the investigation.

Hosick subsequently submitted the facts surrounding the alleged trespass to Richmond's Commonwealth Attorney, who on two separate occasions told Hosick that "there is no probable cause to believe that [Amato] had intent to commit a felony in the presence of the police. [The Commonwealth Attorney] advised against obtaining any warrant for this case," and insisted that "there's no probable cause to obtain a burglary warrant including the lesser offense of trespass." At some unspecified subsequent date, Hosick presented the facts surrounding the alleged trespass to Virginia Magistrate Browning, while Acola submitted the facts to an unidentified Virginia Magistrate. Both Magistrates refused to issue a warrant. Finally, Hosick submitted the facts to Richmond's Chief Magistrate, William Shannon, who advised that this was a civil dispute, and refused to issue a warrant. Hosick asked Magistrate Shannon what would be required to obtain a warrant, and Magistrate Shannon advised that a warrant would be appropriate if there had been a prior occasion when Acola advised Amato to keep away from the premises. Hosick advised Acola of the Magistrate's comment, and Acola had an

episode of suddenly "recovered memory" of just such an incident. Hosick then chauffeured Acola to the Magistrate's office, introduced Acola to the Magistrate, stood in the hallway while Acola filed a complaint, then returned to pick up the arrest warrant finally obtained after being told on eight prior occasions that there was no probable cause for issuance of the warrant.

In light of these facts, the District Court's ruling that "the prime actor here was Acola," is not supported by the facts. At a minimum, this issue was not appropriate for resolution on a motion for summary judgment because "whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities." Skinner v. Railway Labor Executives' Assoc., 489 U.S. 602, 614 (1989). This case parallels the situation in DeLoach v. Bevers, 922 F.2d 618, 621 (10th Cir. 1990) where the court denied a motion for summary judgment because "there was evidence from which the jury could believe that [the officer] manipulated the process" and "worked to cause" the plaintiff's arrest. See also Moore v. Marketplace Restaurant Inc., 754 F.2d 1336, 1345 (7th Cir. 1985) (summary judgment denied because "it is proper for the jury to consider all the evidence, including questions regarding the sufficiency of the deputies' investigation ..., in determining whether there was enough evidence to establish probable cause to arrest").

In two recent cases, the Ninth Circuit and the Eight Circuit have held as a matter of law that contract disputes like the landlord tenant dispute in this case cannot give rise to probable cause to arrest. See Allen v. City of Portland, 1995 WL 747768 (9th Cir. 1995) ("by its definition, probable cause can only exist in relation to

criminal conduct. It follows that civil disputes cannot give rise to probable cause. .... Therefore, we hold that as a matter of law, Officer Fort arrested the plaintiff without probable cause and in violation of her Fourth Amendment rights"); Peterson v. City of Plymouth, 60 F3d 469, 476 (8th Cir. 1995) ("knowledge of plaintiff's reasonable and actual claim of right [to the property] put officer Ridgley on notice that the dispute was a civil matter not involving criminal intent").

Under the facts of this case the appellees are not entitled to qualified immunity because in the words of the Seventh Circuit, they failed to exercise simple common sense. Moore v. Marketplace Restaurant Inc., 754 F.2d at 1346. No police officer could believe that it was objectively reasonable go to the extra-ordinary lengths pursued by Hosick in what was clearly a landlord tenant dispute. If Hosick had been acting in objective good faith, he would have submitted all relevant facts to the magistrate and would have been prepared to respect whatever conclusion was reached by a magistrate given all pertinent facts of the case. Instead, Hosick ignored eight prior determinations that probable cause was lacking; determinations made by four Magistrates, the Richmond Commonwealth Attorney, a lawyer, and the police officer present at the scene of the alleged trespass. Hosick ultimately used his agent, Acola, to distort the information presented to the magistrate who finally issued the arrest warrant. This Court previously recognized, in Goodwin v. Metts, 885 F.2d 157, 164 (1989) that "an officer cannot invoke qualified immunity where he 'did not avail himself of readily available information that would have clarified matters to the point that [the criminal charge] would have been flatly ruled out as factually unsupportable."

CONCLUSION

The Panel opinion in Amato v. City of Richmond, No. 95-1114 (4th Cir. March 5, 1996), decided a question of first impression in this Circuit by issuing an unpublished per curiam opinion which conflicts with decisions of other Courts of Appeal. This important question of first impression should not be decided by an unpublished per curiam opinion which leaves standing the District Court's erroneous resolution of the issue. Furthermore, the Panel exceeded its proper powers by resolving a factual issue against appellants even though appellants opposing a motion for summary judgment were entitled to have all disputed facts resolved in their favor. For these reasons, the Appellant's Petition for Rehearing with Suggestion for Rehearing En Banc should be granted.

Respectfully submitted,

ANTHONY M. AMATO
A. MICHAEL SCOTT

MICHAEL J. KELLY
Counsel for Appellants
The Boulders II - Suite 500
7400 Beaufont Springs Drive
Richmond, Virginia 23225-5519
(804) 330-0006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
10th and Main Streets, Room 334
Post Office Box 630
RICHMOND, VIRGINIA 23205-0630
(804) 771-2249

APR 21 RECD

Chambers of
ROBERT E. PAYNE
United States District Judge

April 17, 1995

To: Counsel in Amato/Scott v. City of Richmond, et al.
Civil Action Nos. 3:94cv193 and 3:94cv198

You were counsel in the above-captioned action which was assigned to me and over which I presided. The developments set forth below prompted this communication.

I was a partner in McGuire, Woods, Battle & Boothe (the "Law Firm") until I became a member of the judiciary on May 28, 1992. At that time, I severed all connections with the Law Firm and my financial interest in it was ended within a few weeks thereafter, except for a supplemental distribution of 1992 profits which was made in 1993. One June 1, 1994, I began accepting assignments of cases in which the Law Firm was counsel.

In 1987, I, like all other equity partners then in the Law Firm, became a limited partner in Ninth & Cary Associates Limited Partnership ("NCA"), a Virginia limited partnership. NCA is a limited partner in One James Center Associates, a Virginia limited partnership that owns the office building in Richmond, Virginia known as "One James Center" and the parking deck located across 10th

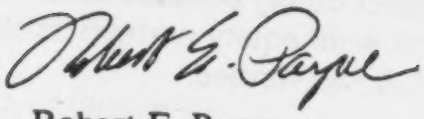
Street therefrom. Other partners in NCA are present and former equity partners in the Law Firm (or their estates) who were equity partners in the Law Firm in 1987 when NCA was formed.

Until last week, I was under the impression that when I left the Law Firm in May 1992, I also ceased being a limited partner in NCA even though I retained a right to receive payment for my interest in NCA when the property owned by One James Center Associates was sold or refinanced. I have just learned that, in fact, I remained a limited partner in NCA. I never had any participation in the management of NCA; and I have had no income percentage in NCA since I left the Law Firm in May 1992. I remain entitled, however, to a share of the proceeds receivable by NCA from One James Center Associates upon the occurrence of certain transactions such as refinancing or sale of the real estate owned by One James Center Associates. My share in NCA currently is 1.442500% which is, in large part, determined by prior years' service at the Law Firm as an equity partner. That share is expected to decrease over time because of my withdrawal from the Law Firm.

I do not consider this inchoate interest in NCA to present the basis for recusal or disqualification in any past or current case. However, if I had understood the foregoing facts correctly when the above-captioned action was assigned to me, the foregoing disclosure would have been made to the litigants.

If you have other views on the subject, any action in the above-captioned action which you consider appropriate in view of the foregoing should be taken promptly.

Sincerely,



Robert E. Payne

/amh

ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE
UNITED STATES DISTRICT COURT
10TH & MAIN STREETS, ROOM 334
RICHMOND, VIRGINIA 23219
OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE $300

Richmond/U.S. Official Mail
Apr17'95/U.S. Postage
VA Penalty
for 0.032
Private
Use $300 H Meter
502263

Michael J. Kelly, Esq.
Hardt & Kelly, P.C.
0707 Forest Hill Avenue
Richmond, Virginia 23235

APR 21 RECD

Supreme Court, U.S.
F I L E D
AUG 7 1996
CLERK

No. 96-23

In The Supreme Court Of The United States

OCTOBER TERM 1996

ANTHONY M. AMATO and A. MICHAEL SCOTT, SR.,

Petitioners,

v.

CITY OF RICHMOND, W.R. SHUMAN, ROBERT HOSICK, TERESA P. GOOCH, LAUREL MILLER, PHILIP MANGANO, MARTY M. TAPSCOTT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

John A. Rupp
City Attorney
William Joe Hoppe
Senior Assistant City Attorney
City of Richmond
900 East Broad Street, Room 300
Richmond, Virginia 23219
(804 780-7951

William G. Broaddus
Counsel of Record
Eugene E. Mathews, III
McGuire, Woods, Battle & Boothe, L.L.P.
One James Center, 901 East Cary Street
Richmond, Virginia 23219
(804) 775-1000

Sarah Jane Chittom
Shuford, Rubin & Gibney
700 Building, Suite 1250
Richmond, Virginia 23206
(804) 648-4442

Counsel for Respondents

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

26 pp

RESTATEMENT OF QUESTIONS PRESENTED

1. Whether, in a civil action pursuant to 42 U.S.C. § 1983 alleging an unlawful search by police officers, the district court properly allocated the ultimate burden of persuasion to the plaintiffs and the burden of production to the defendants when defendants asserted voluntary consent as an exception to the warrant requirement.

2. Whether this Court will grant a petition for a writ of certiorari when there are two independent, alternative grounds supporting the lower court's decision and the petitioner challenges only one of them.

3. May a district court consider on a motion for summary judgment the issue of whether a private party should be deemed an agent or instrument of the government for Fourth Amendment purposes?

TABLE OF CONTENTS

RESTATEMENT OF QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 6

- I - **The district court's opinion applies the correct summary judgment, voluntary consent and burden of proof standards and is in harmony with all other cases addressing the voluntaryconsent issue.** ... 6

  - A - The district court's opinion applies the correct summary judgment, voluntary consent and burden of proof standards. 6

  - B - There is no conflict among the circuits on the issue of defendants' burden to produce evidence that a search was consensual. 8

  - C - Even if the district court's burden of proof analysisconflicts with other circuits, its comments were dicta and not necessary to the decision. 13

- II - **Because petitioners fail to challenge the district court's independent basis of decision on their illegal search claims, their petition seeks an advisory opinion.** 15

- III - **The question of whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes is a proper issue for consideration on a motion for summary judgment.** 16

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Amato v. City of Richmond,
875 F.Supp. 1124 (E.D. Va. 1994) ..... *passim*

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 10

DePugh v. Smith,
880 F.Supp. 651 (N.D. Iowa 1995) 11,12

Exxon Co., U.S.A. v. Sofec, Inc.,
-- U.S. --, 116 S.Ct. 1813 (1996) 17

Graver Tank & Manufacturing. Co., Inc. v. Linde Air Products Co., 336 U.S. 271 (1949) 17

Herb v. Pitcairn,
324 U.S. 117 (1945) 15

Huotari v. Vanderport,
380 F.Supp. 645 (D.Minn. 1974) 12

In re Beard, 811 F.2d 818 (4th Cir. 1987) 18

In re Public Service Co. of New Hampshire,
879 F.2d 987 (1st Cir. 1989) 16

Karnes v. Skrutski,
62 F.3d 485 (3d Cir. 1995) 10

McGann v. Northeast Illinois Regional Commuter Railroad Corp., 8 F.3d 1174 (7th Cir. 1993) 10,11

Preiser v. Newkirk, 422 U.S. 395 (1975) 15

Ruggiero v. Krzeminski, 928 F.2d 558 (2d Cir. 1991) 9,10

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 7, 8, 13

Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989) 16, 17, 18

Tarter v. Raybuck, 742 F.2d 977 (6th Cir. 1984), cert. denied, 470 U.S. 1051 (1985) 11

United States v. Alvarez-Sanchez, -- U.S. --, 114 S.Ct. 1599 (1994). 18

STATUTES

42 U.S.C. § 1983 ..... *passim*

MISCELLANEOUS

W. LaFave, *Search and Seizure* (1996) 8

J. Moore, W. Taggart & J. Wicker,
Moore's Federal Practice (1995-96) 14

I. Silver, *Police Civil Liability* (1996) 8

C. Wright, A. Miller & M. Kane,
Federal Practice and Procedure (1995-96) 14

No. 96-23

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

ANTHONY M. AMATO
and
A. MICHAEL SCOTT, SR.,
Petitioners,

V.

CITY OF RICHMOND, W. R. SHUMAN,
ROBERT HOSICK, TERESA P. GOOCH,
LAUREL MILLER, PHILIP MANGANO,
MARTY M. TAPSCOTT,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the United States Court of Appeals for the Fourth Circuit's unpublished, per curiam opinion in this case, Amato v. City of Richmond, No. 95-1114 (March 5, 1996). That opinion consists of three sentences and affirmed the judgment of the United States District Court in Amato v. City of Richmond, 875 F.Supp.

1124 (E.D. Va. 1994), "on the reasoning of" the district court's opinion. (Pet. App. A3). Consequently, it is the district court's opinion which must be subjected to scrutiny.[1]

STATEMENT OF THE CASE

Anthony M. Amato, a professional informant, and A. Michael Scott, a police officer employed by the Richmond Police Department, instituted separate actions against the City, its chief of police and five other police officers. The individual defendants were named in their individual and official capacities. The district court consolidated the actions for discovery and trial because they involved common issues of law and fact. [2]

To the extent relevant here, in one count of their respective complaints, Amato and Scott sought recovery under 42 U.S.C. § 1983 against four police officers for alleged violations of Amato and Scott's Fourth Amendment right against an illegal search. Their claim arose out of an allegedly non-consensual entry into the residence which they shared. The purpose of the entry and search, which occurred in the presence of Scott, was to arrest Amato pursuant to a warrant on

---

[1]The district court's opinion is printed in petitioners' appendix at A6-A62. Because of numerous typographical errors and occasional omissions of substance, respondents will quote from the opinion printed at 875 F.Supp. 1124 and provide parallel cites to volume 875 of the Federal Supplement and to the appendix.

[2]Although Scott and Amato have filed their Petition for a Writ of Certiorari in this Court pro se, they were represented by counsel of their own choosing in the district court. In the court of appeals, they were represented by a law professor at the University of Richmond.

a misdemeanor trespass charge.

In a separate count, Amato and Scott asserted the illegal search claim against the same four defendants as a violation of state law.

Amato also asserted a separate claim against four officers alleging violation of his Fourth Amendment right against an unlawful arrest. That claim arose out of Amato's voluntary surrender to arrest on warrants charging trespass and extortion.

In addition, Amato and Scott filed separate counts based upon state tort law alleging intentional infliction of emotional distress. The City and its chief of police were named as defendants only in the state tort count. Four of the other officers were also named as defendants in that count.

Following discovery which included 21 depositions, all defendants moved for summary judgment on all claims. The district court granted the motions for summary judgment with respect to the counts alleging violation of petitioners' Fourth Amendment rights and corollary state law. The district court dismissed those claims with prejudice. The court denied the motions with respect to the state tort claim of intentional infliction of emotional distress, but dismissed that count without prejudice because there was no pending federal question remaining in the complaints.

Before considering the facts, the district court reviewed the standards regulating (1) the disposition of motions for summary judgment, (2) the analysis of Fourth Amendment law protecting against illegal searches, and (3) the allocation of the ultimate burden of persuasion and burden of production as

those concepts relate to civil complaints concerning allegations of Fourth Amendment violations. Amato, 875 F.Supp. at 1131-35; (Pet. App. A14-A24). The district court then analyzed the facts measured by the applicable principles of law and concluded, based upon the record, that a jury could not find in favor of petitioners . Consequently, the court entered judgment for the defendants as described above. Amato, 875 F.Supp. at 1135-52; (Pet. App. A4-A5).

With respect to the allegations of unlawful search, the court found that Scott, a police officer trained in the law of the Fourth Amendment, opened the door of the residence he shared with Amato with his own key and no threats were made or coercive actions taken to secure his consent. Amato, 875 F.Supp at 1134, 1137; (Pet. App. A 21, A29). The court also found that the facts established qualified immunity. Amato, 875 F.Supp at 1139-43; (Pet. App. A33-A41). Based on these two separate alternative grounds, the district court dismissed the illegal search claims with prejudice.

The district court also relied upon two independent bases for dismissing with prejudice Amato's unlawful arrest claim finding (1) that it was an unrelated third party (Acola) whose conduct produced the trespass charge and that Acola was not acting at the behest of a police officer, Amato, 875 F.Supp at 1148; (Pet. App. A52), and (2) that, again, the defendants had established qualified immunity. Amato, 875 F.Supp. at 1148-49; (Pet. App. A53-455).[3]

---

[3]While the facts are numerous, the material facts are relatively few and the district court carefully parsed all which petitioners believed relevant. Because the case is controlled by legal principles regarding summary judgment, petitioners' occasional mischaracterizations are immaterial to the proper disposition of the petition. Respondents do note that, contrary

The court of appeals affirmed the judgment of the district court. (Pet. App. A1-A3). Subsequently, the court of appeals denied petitioners' petition for rehearing with suggestion for rehearing in banc. (Pet. App. A65-A66).

Petitioners now challenge only one of the grounds relied on by the district court in dismissing the illegal search counts. They claim there is a split in the circuits on the issue of the proper allocation of the burden of proof in civil cases involving the Fourth Amendment, but they do not challenge the district court's qualified immunity ground which, independently, supported its ruling. Petitioners' challenge to the district court's ruling on the unlawful arrest claim is unclear, but appears to be based only upon the contention that the district court erred in resolving the agency dispute on summary judgment.[4]

---

to petitioners' statement that Dectective "Hosick immediately went to Acola's residence in his police car and chauffeured Acola to [Magistrate] Shannon's office" (Pet. 9) to swear out a warrant for trespass, the record is clear and Judge Payne found that "Acola and Hosick met at Police Headquarters." Amato, 875 F.Supp. at 1146; (Pet. App. A50).

[4]The questions presented by petitioners challenge the district court's rulings only on the illegal search claims and Amato's unlawful arrest claim with respect to the trespass charge. The petition does not question the district court's dismissal of Amato's unlawful arrest claim with respect to the extortion charge, dismissal of petitioners' official-capacity claims, or the dismissal without prejudice of petitioners' state tort claims for the alleged infliction of emotional distress. Accordingly, the petition does not challenge the district court's dismissal of the claims against the City, former Chief of Police Tapscott, and Detective Shuman.

REASONS FOR DENYING THE WRIT

I.
The district court's opinion applies the correct summary judgment, voluntary consent and burden of proof standards and is in harmony with all other cases addressing the voluntary consent issue.

- A -

The district court's opinion applies the correct summary judgment, voluntary consent and burden of proof standards.

Before one can assess whether the court of appeals' summary affirmance of the district court's opinion creates a conflict among the circuits, it is first necessary to understand the district court's approach to the illegal search issue before it.

After describing the factual background and the motions before the court, the district court's opinion addressed the standards regulating summary judgment. Those standards recognize that a non-movant's evidence is to be believed, the non-movant is entitled to all justifiable inferences and the moving party is entitled to summary judgment only if, upon consideration of the record as a whole, a reasonable jury could not find for the non-movant. Amato, 875 F.Supp at 1131-32; (Pet. App. A14-A17).

The court then reviewed the case law concerning unlawful search claims, including this Court's holding that warrantless searches are presumptively unreasonable, but that voluntary consent is a permissible exception. Citing

Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973), and other authority, the district court described voluntary consent adequate to justify a warrantless search as being "freely and intelligently [given] . . . and specific . . . uncontaminated by any duress or coercion, actual or implied." Amato, 875 F.Supp. at 1133; (Pet. App. A19).

With respect to the burden of proof, the district court began with the unremarkable proposition that the plaintiff in a civil case bears the ultimate burden or risk of non-persuasion on all elements of his claim. Here, however, because the plaintiffs produced evidence that the search was warrantless, the court required the defendants to offer evidence that the search was lawful, in this case the result of voluntary consent. Amato, 875 F.Supp. at 1134; (Pet. App. A21). Only if the defendants met their burden of production on the issue of voluntary consent did plaintiffs' ultimate burden or risk of non-persuasion again come into play. Id.[5]

The district court's analysis of the proper allocation of the burdens of proof on the issue of voluntary consent recognizes that

> the term burden of proof actually encompasses two separate burdens. One burden is that of producing evidence, sometimes called the burden of evidence or the burden of going forward. If the party who has the burden of producing evidence does not meet that burden,

---

[5]For reasons discussed, infra, pp. 13-15, the district court's analysis of the burden of proof, while correct, was unnecessary to its ruling on the motion for summary judgment.

> the consequence is an adverse ruling on the matter at issue. The other burden is the burden of persuasion, which becomes crucial only if the parties have sustained their respective burdens of producing evidence and only when all the evidence has been introduced. . . . It is not inevitably true that the burden of production and the burden of persuasion must both fall on the same party.

W. LaFave, Search and Seizure, § 11.2(b) (1996). The district court's analysis and allocation of the burden of proof "reflects a fair accommodation of the constitutional requirements involved," Schneckloth v. Bustamonte, 412 U.S. at 229, in the consideration of voluntary consent in a § 1983 civil action.[6]

The district court then applied the controlling principles of law to all facts which petitioners believed pertinent and untimately concluded that the record did not contain evidence which would permit the jury to find in favor of petitioners. Amato, 875 F.Supp. at 1135-1139; (Pet. App. A25-A33).

- B -

There is no conflict among the circuits on the issue of defendants' burden to produce evidence that a search was consensual.

Petitioners seek to manufacture a conflict among the circuits where none exists. They do so by taking out of context

---

[6]See also I. Silver, Police Civil Liability, § 8.06[5][d][i][B] (1996) ("Although a warrantless search is presumptively unreasonable, this presumption does not create a prima facie civil cause of action and the burden of proof always remains with plaintiff.").

statements from the district court's opinion, including the statement that the court found opinions from two other circuits "unpersuasive," and by snatching phrases from this Court's opinions. Examination of the cases, however, shows that petitioners compare cases which are not in conflict, but which merely describe the burden of proof or production at different stages of the trial process.

The district court below imposed on defendants the burden of production to show that the search was the result of voluntary consent. Only if they met that burden did petitioners' ultimate burden or risk of non-persuasion on the elements of the cause of action come into play. Only the district court and the Court of Appeals for the Second Circuit in Ruggiero v. Krzeminski, 928 F.2d 558 (2d Cir. 1991), have explored the burden of proof analysis through this last step, and they are consistent. In Ruggiero, the Second Circuit held:

> It is true that searches and seizures conducted without warrants are presumptively unreasonable. The operation of this presumption, contrary to the Ruggieros' contention, cannot serve to place on the defendant the burden of proving that the official action was reasonable. Rather, the presumption may cast upon the defendant the duty of producing evidence of consent or search incident to an arrest or other exceptions to the warrant requirement. However, the ultimate risk of nonpersuasion must remain squarely on the plaintiff in accordance with established principles governing civil trials.

Id. at 563 (citations omitted).

The cases cited by petitioners as being in conflict with the district court make passing reference to the acknowledged burden of defendants to prove voluntary consent. As discussed below, however, these cases, unlike Ruggiero, do not address the next and final step in the burden of proof analysis, which is triggered only if defendants prove voluntary consent.

1. Karnes v. Skrutski, 62 F.3d 485 (3d Cir. 1995).

   Here, the Third Circuit reviewed the lower court's grant of defendants' motion for judgment as a matter of law. The standards for a motion for a judgment as a matter of law are, of course, identical to the summary judgment standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). This case is irrelevant, however, because it concerned only the issue of qualified immunity, and defendants clearly bear the burden of proof in raising this defense.

2. McGann v. N.E. Ill. Regional Commuter R.R., 8 F.3d 1174 (7th Cir. 1993).

   In reversing the lower court's grant of summary judgment to the commuter railroad company and several police officers, the Seventh Circuit held that, "under the totality of the circumstances," defendants did not meet their "burden of showing" that plaintiffs consented to being searched. Id. at 1186. Without such a showing, defendants did not meet their burden of producing evidence establishing the voluntary consent exception to the warrant requirement. Because the defendants failed to carry their burden of production, it was unnecessary for the court to address the plaintiff's ultimate burden of non-persuasion.

3. Tarter v. Raybuck, 742 F.2d 977 (6th Cir. 1984), cert. denied, 470 U.S. 1051 (1985).

This case was not resolved on the basis of consent. Instead, the court found that school officials' actions were reasonable under a line of cases addressing searches in a public school context. The court stated in dicta, however, that "[t]he burden would be upon defendants to demonstrate such a voluntary relinquishment of constitutional rights by plaintiff." Id. at 980. That statement is not contrary to the district court's opinion below. As in McGann, the Sixth Circuit does not analyze the allocation of the burdens of proof through the final step. Instead, the Sixth Circuit simply found that defendants' evidence of consent - i.e. the student/plaintiff's acquiescence in a pat-down search - was not sufficient "to demonstrate" - i.e. meet the burden of production - that the student's consent was voluntary.

4. DePugh v. Smith, 880 F.Supp. 651 (N.D. Iowa 1995).

This case addresses the issue of third party consent and is entirely in line with the district court's opinion below. Defendant police officers moved for summary judgment on plaintiff's illegal search claim "because either the affected party or someone with common authority over the property has consented to a search of that property." Id. at 662. While defendants did come forward with some evidence of consent, that evidence was not enough to require granting of their motion for summary judgment because "defendants have failed to demonstrate that it is beyond dispute that Mayor Swenson, even if he had sufficient authority, consented

to each of the three searches they conducted." Id. at 664. This is the court's only allusion to defendants' burden of production and the court refers only to the summary judgment burden of persuasion.

5. Huotari v. Vanderport, 380 F.Supp. 645 (D.Minn. 1974).

The district court here relied on criminal cases when ruling that "defendants' reliance on the defense of consent to validate the search places upon them the burden of proving that consent was, in fact, `freely and voluntarily given.'" Id. at 648. The court found that defendant police officers failed to meet this burden because "there is inadequate evidence from which to find a giving of consent." Id. Accordingly, the court simply found that defendants did not meet their burden of production and, as with the other cases, it was not necessary to consider the ultimate burden of persuasion.

All five of the foregoing cases agree with the district court below that police officers in § 1983 actions have the burden of production on the issue of voluntary consent. Because the officers were unable to meet that burden in the other cases, or the issue was not material, the cases ended at that point and did not reach the final analysis. The district court here should not be faulted for a clear statement of the entire analysis even though it was unnecessary to its summary judgment decision. Its position, affirmed by the court of appeals, is not in conflict with other circuits.

- C -

Even if the district court's burden of proof analysis conflicts with other circuits, its comments were dicta and not necessary to the decision.

Respondents believe that the circuits are in harmony but, if the district court below is in conflict, this is the wrong case to reconcile the split.

This case was resolved on motion for summary judgment. The district judge examined all the facts deemed pertinent by plaintiffs/petitioners and, following the holding of Schneckloth v. Bustamonte, supra, examined the totality of the circumstances. The judge then concluded that no evidence existed in the record which could support a verdict for plaintiffs. Amato, 875 F.Supp. at 1139; (Pet. App. A 33) ("The question remains then whether the record, construed in plaintiffs' favor, permits a reasonable jury to conclude that Scott's consent was coerced. It does not.") Whether plaintiffs had the ultimate burden of proving an illegal search was immaterial because the record, even when read in a light most favorable to them, would not support a judgment for them under any circumstances. The district court's conclusion was not dependant upon whether a particular party could carry the ultimate burden of persuasion, but upon whether there was any evidence in the record to support a verdict for plaintiffs. There was none.

The district court's conclusion on the voluntary consent issue makes clear that petitioners' ultimate burden of persuasion played no role in its consideration of respondents'

motion for summary judgment.[7] Nowhere in the district court's review of the record and analysis of the "voluntariness" issue, Amato, 875 F.Supp. at 1134-39; (Pet. App. A22-A33), does the district court mention the burden of persuasion. When the district court actually reviewed the facts in the record, however, the court expressly mentions the guiding summary judgment standards six times[8] and the totality of the circumstances standard ten times, but does not mention the preponderance of the evidence standard. The ultimate burden of persuasion standard was, quite simply, unimportant to the district court's totality of the circumstances review of the record and ruling on respondents' motion for summary

---

[7]See 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 56.15[3], at 56-267-268 (1995-96) ("On motion for summary judgment by a defendant on the ground that plaintiff has no valid claim, the defendant, as the moving party, has the burden of affirmatively demonstrating that the plaintiff cannot prevail as a matter of law. This is true because the burden to show that there is no genuine issue of material fact rests on the party moving for summary judgment, whether he or his opponent would at trial have the burden of proof on the issue concerned."); 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, § 2727(1983) ("[T]he movant carries the burden of persuading the court that his statement of the facts is accurate."). The district court faithfully followed these principles.

[8]The court introduces its review of the record by noting that

> [t]he issue before the court on this motion for summary judgment, therefore, is whether the evidence could permit reasonable jurors to conclude that the entry into Scott's house was made without Scott's voluntarily given consent. The acts that plaintiffs contend are pertinent to this issue, taken as true and allowing all permissible inferences therefrom, are:

Amato, 875 F.Supp. at 1135; (Pet. App. A24).

judgment on the voluntary consent issue. Thus, it was the absence of evidence that was fatal to petitioners, not the allocation of the ultimate burden of proof.

- II -

Because petitioners fail to challenge the district court's independent basis of decision on their illegal search claims, their petition seeks an advisory opinion.

Even assuming that the district court improperly allocated the burden of proof on the voluntary consent issue and this allocation somehow carries any import, this error was harmless because the district court also ruled that respondents were entitled to qualified immunity from petitioners' illegal search claims. Amato, 875 F.Supp. at 1139-43; (Pet. App. A33-A41). Petitioners do not challenge that ruling. Accordingly, a ruling by this Court on the voluntary consent burden of proof issue would be purely advisory because petitioners did not challenge this alternative, independent basis for granting respondents' motion for summary judgment on the illegal search claim.

This Court has long recognized that its "power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion." Herb v. Pitcairn, 324 U.S. 117, 126 (1945); see also Preiser v. Newkirk, 422 U.S. 395, 401(1975) ("The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy" and "a federal court [lacks] the power to render advisory opinions."). Even assuming that this Court granted certiorari and reversed the district court's ruling on the allocation of the burdens of proof on the voluntary consent issue, such a ruling would not affect the district court's

independent ruling that respondents were entitled to qualified immunity from petitioners' federal claims. Therefore, the effect of a ruling on the burden of proof issue would be purely advisory.

The paucity of guidance from this Court for situations such as this is not surprising, but lower courts have confronted the issue. In In re Public Service Co. of N.H., 879 F.2d 987, 989-90 (1st Cir. 1989), the court, in a per curiam opinion, held that the lower court properly dismissed an appeal where appellant appealed from only one of the separate grounds supporting the judgment at issue. Indeed, the court of appeals there noted that "these principles of law are well known, to the point where the appeal is close to frivolous." 879 F.2d at 990.

Because petitioners' first question seeks review only of the district court's ruling on the burden of proof, and not on qualified immunity, a ruling by this Court on the former would be advisory. Accordingly, for this reason alone, this Court should decline review of petitioners' first question presented.

- III -

The question of whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes is a proper issue for consideration on a motion for summary judgment.

Petitioners' second question deserves little discussion. Petitioners claim that the district court erred in granting summary judgment to respondents on Amato's unlawful arrest claim. They argue that, under this Court's opinion in Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 614 (1989), the question whether a private party should be deemed an agent or

instrumentality of the government for Fourth Amendment purposes is "a factual question inappropriate for resolution on a motion for summary judgment." (Pet. i).

A close reading of petitioners' argument on this point reveals that petitioners do not really question whether summary judgment is a proper vehicle for resolving the agency question. Instead, petitioners actually seek to have this Court make a third review of the record to see if it can find what two previous courts have been unable to find - proof that the complainant was acting at the police officer's behest when he swore out the warrant against Amato. Yet, petitioners were apparently mindful that "[a] court of law, such as this Court is, rather than a court for correction of errors of fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." Exxon Co. v. Sofec, Inc., -- U.S. -- , 116 S.Ct. 1813, 1820 (1996) (quoting Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949)). Hence, petitioners style their second question as a non fact-bound, legal issue.

The Court need look no further than to Skinner, the decision upon which petitioners rely, to reject petitioners' argument. Skinner concerned the propriety of drug and alcohol testing of railroad workers by railroad companies and was resolved in a motion for summary judgment. As an initial matter, this Court considered defendants' position that the tests were "primarily the result of private initiative" and, therefore, did not implicate the Fourth Amendment. Skinner, 489 U.S. at 615. The Court noted that the issue of "[w]hether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private

party's activities, a question that can only be resolved 'in light of all the circumstances.'" Id. at 614 (citations omitted). Based on the summary judgment record, the Court found that "the Government's encouragement, endorsement, and participation" in the drug and alcohol testing served to "implicate the Fourth Amendment." Id. at 615-16. Therefore Skinner demonstrates that where material facts are not in genuine dispute, summary judgment is an appropriate vehicle for resolving the agency question.

Petitioners cannot, and indeed do not, attempt to support the legal position raised in their second question presented. Instead, as noted above, petitioners merely argue their factual allegations on this issue a third time. Respondents need not attempt to rebut these allegations yet again. The district court,[9] after thoroughly reviewing the record and applying the proper summary judgment standards, found that "the evidence in this record does not constitute the deliberate supplying of misleading information. . . . Indeed, it was Acola's conduct, not Hosick's, which produced the trespass charge. There is no evidence that Acola was acting at Hosick's

---

[9]Petitioners' shameless ad hominem attack on the district court judge (Pet. 27-30) was not made in the court of appeals and, therefore, was waived. (Pet. App. A67-A129, A130-A149); see United States v. Alvarez-Sanchez, -- U.S. --, 114 S.Ct. 1599, 1605 n.5 (1994). Moreover, the facts are insufficient to require disqualification. The inchoate interest the district court judge shared with certain members of the trial lawyers' firm, not including trial counsel, involved no ability to participate in management of the buildings and was not related to this litigation. Lacking any reasonable doubt about the judge's own impartiality, disqualification was not required. In re Beard, 811 F.2d 818, 831 (4th Cir. 1987) (district court judge's passive investment, with local counsel, in office building unrelated to case created no reasonable doubt about judge's impartiality).

behest." Amato, 875 F.Supp. at 1148; (Pet. App. A52). The court of appeals "reviewed the district court's opinion, the record, the briefs, and the contentions advanced at oral argument by both parties and [found] no reversible error." (Pet. App. A3). Accordingly, this court should not review the district court's grant of respondents' motion for summary judgment on Amato's unlawful arrest claim relating to the trespass charge.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

John A. Rupp
City Attorney
William Joe Hoppe
Senior Assistant City Attorney
City of Richmond
900 East Broad Street, Room 300
Richmond, VA 23219
(804) 780-7951

Sarah Jane Chittom
Shuford, Rubin & Gilney
700 Building, Suite 1250
Richmond, VA 23206
(804) 648-4442

William G. Broaddus
Counsel of Record
Eugene E. Mathews, III
McGuire, Woods, Battle & Boothe, L.L.P.
One James Center, 901 East Cary Street
Richmond, VA 23219
(804) 775-1085

Counsel for Respondents